

No. 14822

United States
Court of Appeals
for the Ninth Circuit

BLUMENFELD ENTERPRISES, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED

JAN - 5 1955

PAUL P. CUBIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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The Tax Court of the United States

Docket No. 39132

BLUMENFELD ENTERPRISES, Inc.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEARANCES

For Petitioner:

Samuel Taylor, Esq.,
Walter G. Schwartz, Esq.,
Robert O. Folkoff, C.P.A.

For Respondent:

Leonard A. Marcussen, Esq.

DOCKET ENTRIES

1952

Feb. 25—Petition received and filed. Taxpayer notified. Fee paid.

Feb. 27—Copy of petition served on General Counsel.

Feb. 25—Request for hearing at San Francisco, Calif., filed by taxpayer. 3/5/52 Granted.

Mar. 26—Answer filed by General Counsel.

Mar. 27—Copy of answer served on taxpayer. San Francisco.

1953

Jan. 30—Hearing set Mar. 23, 1953, San Francisco.

Mar. 2—Motion for a continuance to the next San Francisco calendar filed by taxpayer.

1953

Mar. 3—Hearing set Mar. 11, 1953 at Washington, D. C., on petitioner's motion.

Mar. 3—Copy of motion and notice of hearing served on General Counsel.

Mar. 9—Motion for a continuance from Mar. 23, 1953, San Francisco calendar, to the next San Francisco calendar filed by taxpayer. Granted.

Mar. 9—Order, that petitioner's motion is granted, proceeding is stricken from the Mar. 23, 1953 San Francisco calendar and continued to the next San Francisco calendar, further order, that proceeding is stricken from the Mar. 11, 1953, Washington, D. C. calendar, entered.

July 31—Hearing set Nov. 2, 1953, San Francisco.

Sep. 29—Motion for a continuance from Nov. 2, 1953, San Francisco calendar to the next San Francisco calendar filed by taxpayer. 9/30/53 Granted.

Dec. 22—Hearing set Mar. 15, 1954, San Francisco.

1954

Mar. 16—Hearing had before Judge Raum on the merits; on petitioner's oral motion to file amended petition. Granted. Respondent given 15 days to file answer. Amended petition (copies served) and stipulation of facts with exhibits 1-A through 5-E filed at hearing. Briefs due 5/3/54; replies due 6/2/54.

1954

- Mar. 25—Answer to amended petition filed by General Counsel. 3/26/54 copy served.
- Apr. 5—Transcript of hearing 3/16/54 filed.
- Apr. 26—Motion for extension to May 17, 1954 to file brief filed by petitioner. 4/27/54 Granted.
- May 12—Stipulation as to corrections of transcript, filed.
- May 17—Brief filed by taxpayer. Brief filed by General Counsel. 5/18/54 copy served.
- Jun. 17—Motion for extension to June 23, 1954, to file reply briefs filed by petitioner. 6/17/54 Granted.
- Jun. 18—Reply brief filed by taxpayer. 6/21/54 copy served.
- Jun. 29—Motion for leave to file reply brief, reply brief lodged, filed by General Counsel. 6/30/54 Granted.
- Sept. 9—Motion for leave to file supplementary brief, supplementary brief lodged, filed by taxpayer. 9/10/54 Granted. 9/10/54 copy served.

1955

- Jan. 20—Findings of fact and opinion filed. Raum, J. Decision will be entered under Rule 50. Copy served 1/20/55.
- Mar. 11—Agreed computation for entry of decision filed.
- Mar. 23—Decision entered, Judge Raum, Div. 11.
- Jun. 15—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by taxpayer.
- Jun. 15—Designation of contents of record on review, filed by taxpayer.

[Title of Tax Court and Cause.]

AMENDED PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated December 12, 1951 and bearing symbols IRA:90-D:HM, and as a basis for its proceeding alleges as follows:

1. Petitioner is a corporation organized and existing under the laws of the State of California with its principal office at San Francisco, California. Petitioner duly filed its corporation income tax returns for the taxable years ended July 31, 1948, 1949 and 1950 with the Collector of Internal Revenue for the First District of California.

2. The notice of deficiency (a copy of which is attached to the original Petition filed in this proceeding as Exhibit A thereto and is incorporated by reference in this Amended Petition as Exhibit A hereof) was mailed to petitioner by registered mail on December 12, 1951.

3. The tax in controversy is income tax in the amount of an alleged deficiency of \$31,710.06 and in the amount of a refund claimed by the petitioner of \$30,803.55. Both deficiency and refund pertain to the taxable year ended July 31, 1948. The total amount of deficiency and refund in controversy is \$62,513.61, and all of said amount is in controversy.

4. The determination of tax and the failure to

allow the claim for refund are based upon the following errors:

(1) The Commissioner erred in disallowing a loss incurred by the petitioner upon its abandonment and the demolition of the Tivoli Theatre Building during the taxable year of the petitioner ended July 31, 1950.

(2) In the alternative to the allegation of error contained in paragraph 4(1) of this Amended Petition, the Commissioner erred in disallowing a loss incurred by the petitioner upon the sale of the Tivoli Theatre Building during the taxable year of the petitioner ended July 31, 1950.

(3) The Commissioner erred in reducing the cost basis for depreciation of the Tivoli Theatre Building, the Tivoli Office Building, and the equipment of said buildings from the amounts reported by the petitioner on its returns and consequently further erred in correspondingly reducing the deduction for depreciation of said property taken by the petitioner during its fiscal years ended July 31, 1948, 1949 and 1950.

(4) The Commissioner erred in disallowing the carry-back to the fiscal year ended July 31, 1948 of a net operating loss sustained by the petitioner in the fiscal year ended July 31, 1950.

5. The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) Shortly before May 1, 1950, the petitioner abandoned the Tivoli Theatre Building theretofore used by it in its trade or business and granted to

the lessee of said building the authority to demolish said building. The lessee thereupon caused the demolition of the building commencing on or about May 1, 1950. The cost of the theatre building to the petitioner at the time of its abandonment and demolition was \$193,275.42, against which there was a reserve for depreciation of \$39,049.08. The depreciated cost of the theatre building to the petitioner at the time of its abandonment and demolition was \$154,226.34. The petitioner incurred a loss in this amount in its fiscal year ended July 31, 1950 as a result of the abandonment and demolition of the theatre building. In the alternative, this transaction comprised a sale by the petitioner to its lessee of the Tivoli Theatre Building at a loss to petitioner of \$154,226.34. Said building was used in petitioner's trade or business and had been held for more than six months. Said loss constituted a loss deductible in full under the provisions of Section 117(j) of the Internal Revenue Code.

(2) Allocation of the original purchase price paid by the petitioner for the Tivoli property was made by the petitioner and by the Commissioner as follows:

	Petitioner's Allocation	Commissioner's Allocation
Land	\$ 92,448.19	\$136,192.27
Theatre building	154,391.15	131,178.55
Office building	85,289.35	65,769.72
Equipment	10,272.03	9,260.18
	<hr/>	<hr/>
Total.....	\$342,400.72	\$342,400.72
	<hr/> <hr/>	<hr/> <hr/>

The petitioner and the Commissioner are in agreement as to the rates of depreciation and as to the allocation of the improvements to said property. The petitioner in its income tax returns for its fiscal years ended July 31, 1948, 1949 and 1950 has computed its depreciation on the basis of its own allocation shown above; whereas, the Commissioner has reduced said depreciation allowances and has computed such allowances on the basis of the allocation made by the Commissioner, as shown above. The depreciation claimed by petitioner in its income tax returns for its fiscal years ended July 31, 1948, 1949 and 1950 is correctly stated, and the Commissioner erred in reducing said depreciation.

(3) As a consequence of its loss upon the Tivoli Theatre Building during its fiscal year ended July 31, 1950 and of its other operations during said year, the petitioner incurred a net operating loss for said taxable year in the amount of \$82,818.32. Petitioner duly claimed said loss by way of a net operating loss carry-back to its fiscal year ended July 31, 1948. Said loss was properly allowable by way of a net operating loss carry-back to said year. As a result of said net operating loss carry-back to said year, the petitioner was entitled to a refund of \$30,803.55 in income tax for said year. An application for tentative carry-back adjustment and a claim for refund were duly filed claiming said refund of \$30,803.55 for said year. As a result of the disallowance of the net operating loss carry-back to the taxable year ended July 31, 1948 and as a result of the adjustments to depreciation referred to in Para-

graph 5(2) of this Amended Petition, the Commissioner has erroneously determined a deficiency in tax for said year.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no deficiency in income tax due from this petitioner for its taxable year ended July 31, 1948, that there is a refund in income tax due to petitioner in the amount of \$30,803.55 or in such amount as this Court may determine and that it may grant such further relief as may to it seem proper.

Dated: San Francisco, California, March 15, 1954.

Respectfully submitted,

/s/ SAMUEL TAYLOR,

/s/ WALTER G. SCHWARTZ,

/s/ ROBERT O. FOLKOFF by S.T.,
Counsel for Petitioner

Duly Verified.

EXHIBIT A

Treasury Department, Internal Revenue Service, 74
New Montgomery St., San Francisco 5, California.

San Francisco Division IRA:90-D:HM

Blumenfeld Enterprises, Inc. Dec. 12, 1951
70 Eddy St., San Francisco, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended July

31, 1948 discloses a deficiency of \$31,710.06 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,

Commissioner,

/s/ By F. M. HARLESS,

Internal Revenue Agent in Charge

Enclosures: Statement, Form 1276, Form 870, Exhibit A.

STATEMENT

Tax Liability for the Taxable Year Ended July 31, 1948.

	Liability	Assessed	Deficiency
Income tax	\$65,026.30	\$33,316.24	\$31,710.06

This determination of your income tax liability has been made on the basis of information on file in this office. Careful consideration has been given your claim for refund filed December 11, 1950.

If a petition to The Tax Court of the United States is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by the Board in any redetermination of your tax liability. If a petition is not filed, the claim for refund will be disallowed and official notice will be issued by registered mail in accordance with section 3772 of the Internal Revenue Code.

Due to the adjustments to your net income for the year ended December 31, 1950, the net operating loss claimed for that year has been eliminated.

ADJUSTMENTS TO NET INCOME

Year Ended: July 31, 1948

Net income as disclosed by return.....	\$133,808.73
Unallowable deductions and additional income:	
(a) Depreciation	39,013.77
Total	\$172,822.50
Nontaxable income and additional deductions:	
(b) Franchise tax	1,700.65
Net income as adjusted.....	\$171,121.85

EXPLANATION OF ADJUSTMENTS

(a) Deduction for depreciation is decreased by \$39,013.77, as shown in Exhibit A attached.

(b) Franchise tax deduction is increased by \$1,700.65 as follows:

Increase in income for year ended July 31, 1947	
as adjusted	\$ 49,321.77
Add: Franchise tax adjustment for year ended July 31, 1947	697.40
	<hr/>
Increase in income subject to franchise tax.....	\$ 50,019.17
Increase in franchise tax deduction (3.4% of \$50,019.17)	\$ 1,700.65

COMPUTATION OF INCOME TAX

Year Ended: July 31, 1948

Net income	\$171,121.85
Normal tax net income.....	\$171,121.85
Surtax net income	\$171,121.85
Total normal tax on \$171,121.85 at 24%.....	\$ 41,069.27
Total surtax on \$171,121.85 at 14%.....	23,957.06
	<hr/>
Correct income tax liability.....	\$ 65,026.30
Income tax assessed:	
Original Account No. 410095, January 1949 List, First California District....	\$ 50,847.32
Additional, Account No. 528302, August 31, 1950 List.....	13,272.47
	<hr/>
	\$ 64,119.79
Less: Tentative allowance under section 3780	30,803.55
	<hr/>
Deficiency of income tax.....	\$ 31,710.06

DEPRECIATION SCHEDULE

	Date Acquired	Cost		Depreciation Allowable 1948
Esquire Theatre— Stockton				
Improvements	11-25-46	\$235,175.93	4%	\$ 9,407.03
Improvements	12-16-47	4,351.09	4%	108.75
Esquire Theatre— Sacramento				
Leasehold	8- 1-45	230,000.00	6 $\frac{2}{3}$ %	15,333.33
Tower Theatre leasehold	5- 1-45	140,000.00	6 $\frac{2}{3}$ %	9,333.33
Times Theatre leasehold	8- 1-45	140,000.00	6 $\frac{2}{3}$ %	9,333.33
Roxie Theatre leasehold	8- 1-45	350,000.00	6 $\frac{2}{3}$ %	23,333.33
Stockton Motor Movies				
Paving	5-14-48	68,492.00 (2 $\frac{1}{2}$ mo.)	10%	1,426.92
Buildings	5-14-48	73,930.28 (2 $\frac{1}{2}$ mo.)	6 $\frac{2}{3}$ %	1,026.81
Fence	5-14-48	7,500.00 (2 $\frac{1}{2}$ mo.)	10%	156.25
Speakers	5-14-48	14,184.57 (2 $\frac{1}{2}$ mo.)	25%	738.78
Tivoli Theatre				
Repairs capitalized	8- 1-47	12,018.84	5%	600.94
Appraisal fee capitalized	8- 1-45	5,000.00	8 $\frac{1}{3}$ %	416.00*
Building	8- 1-47	141,047.94	224 mo.	7,556.14
Office building	8- 1-47	94,325.05	224 mo.	5,053.13
Equipment	8- 1-47	7,891.58	104 mo.	910.57
Depreciation allowable.....				\$ 84,734.64
Depreciation claimed.....				123,748.41
Decrease.....				\$ 39,013.77

* [In longhand]: This is not part of the Tivoli Bldg.

[Endorsed]: T.C.U.S. Filed March 16, 1954.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated by and between counsel for the petitioner and counsel for the respondent in the above-entitled case that the following facts may be taken as true in said case:

1. Petitioner is a corporation organized and existing under the laws of the State of California with its principal office at San Francisco, California. Petitioner filed its corporation income tax returns for its fiscal years ended July 31, 1948, 1949 and 1950 with the Collector of Internal Revenue for the First District of California. Petitioner keeps its books and files its returns on the accrual basis.

2. Respondent on or about June 27, 1952 mailed to petitioner by registered mail the notice of deficiency covering its fiscal years ended July 31, 1949 and 1950. A copy of said notice is attached hereto as Exhibit 1-A. Petitioner did not file a petition with The Tax Court of the United States for a redetermination of the deficiencies set forth in said notice. Petitioner paid said deficiencies and filed claims for the refund thereof.

3. This proceeding involves a piece of real property located in downtown San Francisco, California known as the Tivoli property. Prior to the close of petitioner's fiscal year ended July 31, 1950, two separate buildings were located on the Tivoli property, one known as the Tivoli Theatre Building and the other known as the Tivoli Office Building. The build-

ings were separate and distinct buildings. Their relative location is shown on the map attached hereto as Exhibit 2-B. The Tivoli Theatre Building was a Class A reinforced concrete building; the Tivoli Office Building is a Class B brick building.

4. Petitioner acquired a leasehold in the Tivoli property in July 1945 and on or about March 10, 1946 petitioner purchased the fee interest in the Tivoli property.

5. On October 6, 1949, petitioner as lessor and Harry Morofsky as lessee executed a lease of the Theatre Building, and Herman Hertz executed a limited guaranty of the lessee's obligations under said lease. A copy of said lease and guaranty is attached hereto as Exhibit 3-C. Exhibit A to said lease is omitted; said Exhibit A comprised a sketch substantially the same as Exhibit 2-B to this Stipulation of Facts.

6. Neither Harry Morofsky nor Herman Hertz is a shareholder or officer of petitioner, and neither is related to any of the shareholders or officers of petitioner.

7. After the execution of the lease agreement of October 6, 1949, Harry Morofsky, the lessee, submitted to the proper authorities of the City and County of San Francisco his plans for remodeling the Tivoli Theatre Building so as to convert said building to a five story parking garage, said plans having previously been approved by petitioner. The City and County authorities declined to approve said plans as submitted and insisted upon costly

revisions involving a substantial increase in the thickness of the walls by the addition of concrete, the inclusion of additional supporting members, and changes in the plans for the ramps, all of such a nature as to reduce substantially the amount and convenient useability of floor space for parking purposes and to render it economically unfeasible to use the Theatre Building for the purpose of a parking garage.

8. On April 24, 1950, petitioner and Harry Morofsky signed the letter agreement attached hereto as Exhibit 4-D. Pursuant thereto the Tivoli Theatre Building was demolished.

9. On February 23, 1951, petitioner and Harry Morofsky executed the agreement attached hereto as Exhibit 5-E. On September 27, 1951, Harry Morofsky exercised the option granted by the agreements of April 24, 1950 and February 23, 1951 to purchase the Tivoli property, and on November 7, 1951 Harry Morofsky assigned his rights thereunder to the Hertz Shoe Clinic, Inc., a corporation. Said corporation is now the owner of the Tivoli property.

10. In its income tax return for its fiscal year ended July 31, 1950, petitioner claimed as a deduction an abandonment loss on the demolition of the Tivoli Theatre Building in the amount of \$154,226.34, representing the undepreciated balance of the cost of that Building, as shown on petitioner's books, resulting in a net operating loss of \$82,818.32 for its fiscal year ended July 31, 1950. Petitioner claimed a net operating loss carry-back of

\$82,818.32 from its fiscal year ended July 31, 1950 to its fiscal year ended July 31, 1948 and made an application for a tentative carry-back adjustment under section 3780 of the Internal Revenue Code. A tentative allowance was made to petitioner under said section in the amount of \$30,803.55.

11. In his determination of petitioner's deficiency for the fiscal year ended July 31, 1950 (see Exhibit 1-A hereto), respondent has disallowed the deduction of \$154,226.34 claimed upon the demolition of the Tivoli Theatre Building, and in his notice of deficiency to petitioner for its fiscal year ended July 31, 1948 (Exhibit A to the petition), respondent has not allowed the net operating loss deduction claimed by petitioner.

12. Petitioner's adjusted basis for the Tivoli property as of August 1, 1947, is as shown below, rather than the amounts shown in the notice of deficiency for petitioner's fiscal year ended July 31, 1948 and in the notice of deficiency for petitioner's fiscal years ended July 31, 1949 and 1950 (Exhibit 1-A hereto):

	Adjusted Basis—August 1, 1947	
	Per Notices of Deficiency	As Stipulated
Theatre building	\$141,047.94	\$148,785.47
Office building	94,325.05	100,831.59
Equipment	7,891.58	8,228.87
Land	136,192.27	121,610.91

13. The depreciation allowable to petitioner with respect to the Tivoli property for the fiscal years ended July 31, 1948, 1949 and 1950 is as follows,

rather than the amounts allowed by the said notices of deficiency:

	Allowable Depreciation	
	Per Notices of Deficiency	As Stipulated
Theatre building:		
F.y.e. 7/31/48 and '49	\$7,556.14	\$7,970.65
F.y.e. 7/31/50	1,889.04	1,992.66
Office building (all years)	5,053.13	5,401.69
Equipment:		
F.y.e. 7/31/48	910.57	949.48
F.y.e. 7/31/49	949.96	949.48
F.y.e. 7/31/50	227.64	237.37

14. In the event that this Court should determine that petitioner is entitled to a deduction by reason of the demolition, abandonment or sale of the Tivoli Theatre Building, the amount allowable is \$132,284.42, computed as follows:

(a) Theatre Building	\$148,785.47	
Less depreciation allowed or allowable		
F.y.e. July 31, 1948	\$7,970.65	
F.y.e. July 31, 1949	7,970.65	
F.y.e. July 31, 1950	1,992.66	
		17,933.96
Unrecovered cost		\$130,851.51
(b) Improvements	1,598.42	
Less depreciation allowed or allow- able to November 1, 1949.....	165.51	
Unrecovered cost		1,432.91
		\$132,284.42

15. Petitioner has claimed in its returns, and respondent has allowed, depreciation on the Tivoli

Theatre and Office Buildings on the basis of a remaining life of twenty (20) years from the date of its acquisition of the fee interest therein (March 10, 1946).

Dated: San Francisco, California, March 16, 1954.

Respectfully submitted,

/s/ SAMUEL TAYLOR,

/s/ WALTER G. SCHWARTZ,

/s/ ROBERT O. FOLKOFF,
Counsel for Petitioner

/s/ DANIEL A. TAYLOR,
Counsel for Respondent

EXHIBIT 1-A

U. S. Treasury Department, Office of Internal Revenue Agent in Charge, 74 New Montgomery St., San Francisco 5, California.

San Francisco Division, IRA:90-D:CRA

Blumenfeld Enterprises, Inc. Jun 27, 1952
70 Eddy St., San Francisco, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year(s) ended July 31, 1949 and July 31, 1950 discloses a deficiency of \$27,169.76 as shown in the statement attached.

In accordance with the provisions of existing

internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to this office for the attention of IRA:90-D. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,
Commissioner,

/s/ By F. M. HARLESS,
Internal Revenue Agent in Charge

Enclosures: Statement, Form 1276, Agreement
Form, Exhibits A, A-1 and A-2.

STATEMENT

Tax Liability for the Taxable Years Ended July 31, 1949 and July 31, 1950:

Fiscal Year Ended	Liability	Assessed	Deficiency
July 31, 1949	\$58,719.51	\$57,858.70	\$ 860.81
July 31, 1950	26,308.95	0.00	26,308.95
Total.....			<u>\$27,169.76</u>

In making this determination of your income tax liability, careful consideration has been given to your protest filed February 25, 1952, and to the statements made at the conference held on March 25, 1952.

A copy of this letter and statement has been mailed to your representative Mr. Samuel Taylor, 1211 Balfour Building, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

ADJUSTMENTS TO NET INCOME

Fiscal Year Ended July 31, 1949

Net income as disclosed by return.....	\$152,444.15
Unallowable deductions and additional income:	
(a) Depreciation	13,196.40
Total	<u>\$165,640.55</u>
Nontaxable income and additional deductions:	
(b) Franchise tax	1,326.47
Net income as adjusted.....	<u>\$164,314.08</u>

EXPLANATION OF ADJUSTMENTS

(a) For computation of depreciation adjustment see Exhibits A, A-1 and A-2 hereto attached.

(b) Additional franchise tax deduction is computed as follows:

Additional income for the fiscal year ended July 31, 1948 as previously determined for that year (\$36,628.21 plus \$2,385.56)	\$ 39,013.77
Franchise tax at 3.4% x \$39,013.77=.....	\$ 1,326.47

The above additional franchise tax was accruable on August 1, 1948 the first day of the fiscal year ended July 31, 1949.

COMPUTATION OF ALTERNATIVE INCOME TAX

Fiscal Year Ended July 31, 1949

Normal-tax net income	\$164,314.08
Excess of long-term capital gain over short-term capital loss	28,614.15
Adjusted normal-tax net income.....	\$135,699.93
Surtax net income	\$164,314.08
Less: Excess of net long-term gain over net short-term loss	28,614.15
Adjusted surtax net income.....	\$135,699.93
Normal tax at 24%	\$ 32,567.98
Surtax at 14%	18,997.99
Total normal tax and surtax.....	\$ 51,565.97
Add: 25% of excess of net long-term capital gain over net short-term capital loss	7,153.54
Alternative tax	\$ 58,719.51

COMPUTATION OF INCOME TAX

Fiscal Year Ended July 31, 1949

Net income	\$164,314.08
Adjusted net income	\$164,314.08
Normal-tax net income	\$164,314.08
Surtax net income	\$164,314.08
Normal Tax Computation	
Normal-tax net income.....	\$164,314.08
Tax at 24%	\$ 39,435.37

STATEMENT

Tax Liability for the Taxable Years Ended July 31, 1949 and July 31, 1950:

Fiscal Year Ended	Liability	Assessed	Deficiency
July 31, 1949	\$58,719.51	\$57,858.70	\$ 860.81
July 31, 1950	26,308.95	0.00	26,308.95
Total.....			<u>\$27,169.76</u>

In making this determination of your income tax liability, careful consideration has been given to your protest filed February 25, 1952, and to the statements made at the conference held on March 25, 1952.

A copy of this letter and statement has been mailed to your representative Mr. Samuel Taylor, 1211 Balfour Building, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

ADJUSTMENTS TO NET INCOME

Fiscal Year Ended July 31, 1949

Net income as disclosed by return.....	\$152,444.15
Unallowable deductions and additional income:	
(a) Depreciation	13,196.40
Total	<u>\$165,640.55</u>
Nontaxable income and additional deductions:	
(b) Franchise tax	1,326.47
Net income as adjusted.....	<u>\$164,314.08</u>

EXPLANATION OF ADJUSTMENTS

(a) For computation of depreciation adjustment see Exhibits A, A-1 and A-2 hereto attached.

(b) Additional franchise tax deduction is computed as follows:

Additional income for the fiscal year ended July 31, 1948 as previously determined for that year (\$36,628.21 plus \$2,385.56)\$ 39,013.77
 Franchise tax at 3.4% x \$39,013.77=.....\$ 1,326.47
 The above additional franchise tax was accruable on August 1, 1948 the first day of the fiscal year ended July 31, 1949.

COMPUTATION OF ALTERNATIVE INCOME TAX
 Fiscal Year Ended July 31, 1949

Normal-tax net income	\$164,314.08
Excess of long-term capital gain over short-term capital loss	28,614.15
Adjusted normal-tax net income.....	\$135,699.93
Surtax net income	\$164,314.08
Less: Excess of net long-term gain over net short-term loss	28,614.15
Adjusted surtax net income.....	\$135,699.93
Normal tax at 24%	\$ 32,567.98
Surtax at 14%	18,997.99
Total normal tax and surtax.....	\$ 51,565.97
Add: 25% of excess of net long-term capital gain over net short-term capital loss	7,153.54
Alternative tax	\$ 58,719.51

COMPUTATION OF INCOME TAX
 Fiscal Year Ended July 31, 1949

Net income	\$164,314.08
Adjusted net income	\$164,314.08
Normal-tax net income	\$164,314.08
Surtax net income	\$164,314.08
Normal Tax Computation	
Normal-tax net income.....	\$164,314.08
Tax at 24%	\$ 39,435.37

Surtax Computation

Net income from above.....	\$164,314.08	
Surtax net income	\$164,314.08	
Tax at 14%		23,003.97
		<hr/>
Total normal tax and surtax.....		\$ 62,439.34
Alternative tax		\$ 58,719.51
Correct income tax liability.....		\$ 58,719.51
Income tax assessed:		
Original, No. 410003		
First California District	\$ 54,208.94	
Additional assessed—Account No.		
528303—List Aug. 1950	3,649.76	57,858.70
	<hr/>	<hr/>
Deficiency of income tax.....		\$ 860.81

ADJUSTMENTS TO NET INCOME

Fiscal Year Ended July 31, 1950

Net income as disclosed by return		(\$ 82,818.32)
Unallowable deductions and additional income:		
(a) Depreciation	\$ 1,804.84	
(b) Abandonment loss	154,226.34	
(c) Additional capital gain	749.15	156,780.33
	<hr/>	<hr/>
Total		\$ 73,962.01
Nontaxable income and additional deductions:		
(d) Franchise tax	\$ 79.76	
(e) Contributions	3,693.40	3,773.16
	<hr/>	<hr/>
Net income as adjusted.....		\$ 70,188.85

EXPLANATION OF ADJUSTMENTS

(a) For computation of depreciation adjustment see attached Exhibit A.

(b) In your return you claimed as an abandonment loss the sum of \$154,226.34 as representing the undepreciated balance of cost of the theatre portion of the Tivoli Building which was demolished during the year. The demolition was accomplished by the lessee of the building under the terms of a modification dated April 24, 1950 of a lease dated October 9, 1949 which gave the lessee the

right to change the theatre into a multi-story garage for rentals to total \$420,000.00 plus real estate taxes over a 25-year period.

The unrecovered cost of the building voluntarily demolished in connection with securing the lease is held to be a capital cost of the lease amortizable over the life of the lease. The claimed abandonment loss is therefore disallowed.

(c) Additional capital gain is computed as follows:

Decrease in basis of Tivoli Theatre equipment:

Book value	\$ 10,272.03	
As revised in Exhibit A-1 attached.....	9,260.18	\$ 1,011.85

Less: Decrease in accumulated depreciation:

Per books—\$10,272.03x10% \times 42/12	\$ 3,680.81	
Allowable to July 31, 1947....	\$1,369.60	
Allowable 8/1/47 to 7/31/49	1,820.90	
Allowable 8/1/49 to 10/31/49	227.61	3,418.11
		262.70

Net adjustment	\$ 749.15
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(d) Additional franchise tax is computed as follows:

Net income fiscal year ended 7/31/49 as computed herein	\$164,314.08
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Franchise tax deducted in return for fiscal year ended July 31, 1949	4,538.59
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Additional franchise tax allowed in fiscal year ended July 31, 1949 as computed herein.....	1,326.47
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Net capital loss carry-over to fiscal year ended July 31, 1949	12,342.75
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Total subject to franchise tax.....	\$182,521.89
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Franchise tax 3.4% \times \$182,521.89	\$ 6,205.74
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Franchise tax claimed in return.....	6,125.98
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Additional franchise tax	\$ 79.76
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(e) Contributions were not claimed due to the fact that your return as filed showed no net income. The above adjustments produce net income in the sum of \$73,868.16 before contributions. Actual contributions totalled \$12,072.54. A deduction is therefore allowed to the extent of 5% of such revised net income before contributions in accordance with the provisions of Section 23(q) of the Internal Revenue Code.

$$5\% \times \$73,868.16 = \$3,693.40$$

COMPUTATION OF ALTERNATIVE INCOME TAX

Fiscal Year Ended July 31, 1950

Computation at rates applicable before July 1, 1950

Normal-tax net income	\$ 70,188.85
Excess of long-term capital gain over short-term capital loss	2,614.56
Adjusted normal-tax net income.....	\$ 67,574.29
Surtax net income	\$ 70,188.85
Less: Excess of net long-term gain over net short- term loss	2,614.56
Adjusted surtax net income.....	\$ 67,574.29
Normal tax at 24%	\$ 16,217.83
Surtax at 14%	9,460.40
Total normal tax and surtax.....	\$ 25,678.23
Add: 25% of excess of net long-term capital gain over net short-term capital loss	653.64
Alternative tax	\$ 26,331.87
Computation at rates applicable after July 1, 1950	
Ordinary net income	\$ 67,574.29
Dividends received credit	0.00
Surtax net income	\$ 67,574.29
Combined normal and surtax at 45%.....	\$ 30,408.43
Adjustments	0.00
Partial tax	\$ 30,408.43
25% of excess of long-term capital gain over short- term capital loss	653.64
Alternative tax	\$ 31,062.07
Less: \$5,000.00 (20% of \$25,000.00 not subject to surtax)	5,000.00
Amount subject to proration below.....	\$ 26,062.07

Proration of taxes computed above:

Alternative tax at rates applicable before

July 1, 1950\$ 26,331.87

Portion of alternative tax $334/365 \times \$26,331.81$ \$ 24,095.46

Alternative tax at rates applicable after

July 1, 1950\$ 26,062.07

Portion of alternative tax $31/365 \times \$26,062.07$ 2,213.49

Total alternative tax\$ 26,308.95

COMPUTATION OF INCOME TAX

Fiscal Year Ended July 31, 1950

Computation at rates applicable before July 1, 1950

Net income\$ 70,188.85

Less: Interest on certain obligations of the United

States and its instrumentalities 0.00

Adjusted net income\$ 70,188.85

Less: Dividends received credit 0.00

Normal tax net income.....\$ 70,188.85

Surtax net income\$ 70,188.85

Normal tax at 24%.....\$ 16,845.32

Surtax at 14% 9,826.44

Total normal tax and surtax.....\$ 26,671.76

Computation at rates applicable after July 1, 1950

Normal tax net income as shown above.....\$ 70,188.85

Surtax net income as shown above.....\$ 70,188.85

Combined normal tax and surtax at 45%.....\$ 31,584.98

Less: \$5,000.00 ($20\% \times \$25,000.00$ not subject to surtax) 5,000.00

Amount subject to proration below.....\$ 26,584.98

Proration of taxes computed above

Normal tax and surtax at rates applicable

before July 1, 1950\$ 26,671.76

Portion of normal tax and surtax	
334/365x\$26,671.76	\$ 24,406.49
Normal tax and surtax at rates applicable after July 1, 1950	\$ 26,584.98
Portion of normal tax and surtax	
31/365x\$26,584.98	2,257.90
Total	\$ 26,664.39
Alternative tax	\$ 26,308.95
Correct income tax liability.....	\$ 26,308.95
Income tax assessed—Account No. 9205311—	
First California District.....	0.00
Deficiency of income tax.....	\$ 26,308.95

DETERMINATION OF BASIS FOR DEPRECIATION

As of August 1, 1947

	Amount	Portion Applied To:		
		Theater Building	Equipment	Office Building Land
Fee purchase:				
Relative values taken	\$202,368.36	15%	2.5%	32.5%
Actual cost		\$307,356.24	\$7,093.21	\$65,759.72
				\$101,708.18
Merging unamortized leasehold costs	\$110,032.36	72%	3%	0
Relative values taken				
Actual cost		\$110,032.36	\$4,200.97	\$35,708.09
Improvements: (Allocation estimated per discussion with the accountant)				
	\$36,174.34	\$4,118.89	-	\$27,355.75
	5,109.26	1,297.31	-	3,861.95
	1,211.00	-	-	1,211.00
	12,018.84	12,018.84	-	-
	\$57,893.44	\$22,424.71	-	\$35,458.70
Total costs applied:	\$400,294.16	\$453,603.29	\$9,260.18	\$101,228.42
Depreciation allowed or allowable to 7/31/47				
Revenue Agent's Report return: 64% theater)	\$300.47	\$300.47		
36% office)	19,148.26	12,256.88		6,893.37
10% of book value taken - 16/12 year	1,348.60	1,348.60		
Adjusted basis 8/1/47		\$12,555.35	\$1,348.60	\$6,893.37
		\$11,206.94	\$7,891.58	\$94,325.05
				\$136,192.27

It is held that the total of fee purchase cost and the unamortized balance of leasehold cost approximate actual fair market value if the lease reflected fair rentals at the time of purchase, and the allocation gives substantially fair valuations to the portions in view of income and other valuation factors ascertainable.

Blumenfeld Enterprises, Inc.

EXHIBIT A-2

Adjusted basis of Tivoli Theatre Building at July 1, 1947 as computed in Exhibit A-1	
Less: Depreciation allowed or allowable:	
fiscal year ended July 31, 1948	\$7,556.14
fiscal year ended July 31, 1949	7,556.14
fiscal year ended July 31, 1950	1,889.40
Unrecovered cost as at November 1, 1949	\$124,046.62
Improvements on Tivoli Theatre - cost	\$1,598.42
Less: Depreciation allowed or allowable to November 1, 1949	165.51
Unrecovered cost as at November 1, 1949	\$1,432.91

MASON ST.

69'

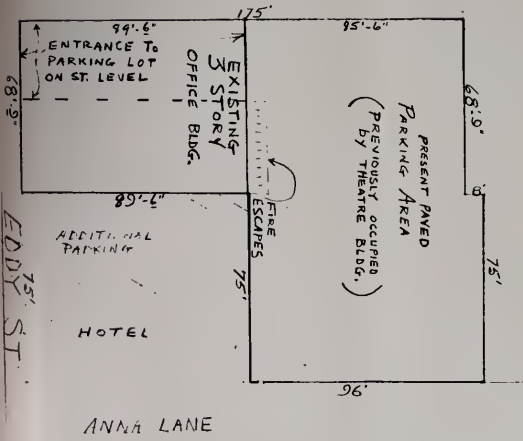


Exhibit 2-B

THIS INDENTURE, made this 6th day of October, 1949

by and between **BLUMENTFELD ENTERPRISES, INC., a California corporation**

LEASE

hereinafter called "Lessor," and **HARRY MOROFSKY, of the City and County of San Francisco, State of California**

hereinafter called "Lessee,"

WITNESSETH:

In consideration of the rents herein received and of the covenants and agreements herein contained on the part of the Lessee to be kept and performed, the Lessor has demised and leased and does by these presents demise and lease unto the Lessee, and the Lessee has hired and taken and does by these presents hire and take from the Lessor the premises herein described for the term herein specified, subject to all the following terms, covenants and conditions:

1. PREMISES: The premises hereby leased are as follows:

The entire building known as the Tivoli Theatre Building, which has heretofore housed the premises known as the Tivoli Theatre, with the front entrance approximately thirty feet frontage on the north side of Eddy Street, known as No. 70 Eddy Street, between Anna Lane and Mason Street, together with the basement thereunder, and more particularly designated and described for identification on the plat made and annexed hereto, marked "Exhibit A," and by such reference made a part hereof, all located in the City and County of San Francisco, State of California. The leased premises do not include any part of the front building, nor the stairs, leading from the roof to the main entrance of the said building, with the exception of the downstairs ticket office and the foyer entrance and basement under said foyer. The said ticket office will have its own entrance, to be provided by and at the expense of the Lessee.

2. TERM: The term of this lease shall be for the following period: Twenty-five years, commencing on May 1, 1950, and ending on the last day of April, 1975.

3. RENT: As rental hereunder the Lessee shall pay to the Lessor the following sum or sums in the manner following: The total rent in the amount of \$420,000.00, payable at the rate of \$1,250.00 per month, commencing on May 1, 1950, the receipt of which said first month's rental is hereby acknowledged, and the additional sum of \$1,250.00 on the first day of each end every month thereafter, in advance, for the first ten years or said term, ending with the month of April, 1960; and commencing on the first day of May 1960, the monthly rental to be paid shall be the sum of \$1,500.00, and a like sum of \$1,500.00 to be paid on the first day of each end every month thereafter for the remaining fifteen years, until the full sum of \$420,000.00 shall have been fully paid.

Said rental and all other sums which are to be paid or repaid by the Lessee to the Lessor hereunder shall be paid in ~~cash~~ ~~advance~~ ~~at~~ ~~the~~ ~~time~~ ~~of~~ ~~payment~~ ~~thereof~~ ~~at~~ ~~the~~ ~~following~~ ~~address:~~ 70 Eddy Street, San Francisco, California

or at such other place as the Lessor may hereafter from time to time designate by a notice in writing. All rentals and other sums to be paid or repaid to the Lessor hereunder shall bear interest at the legal rate from the time when payable hereunder; and all such other sums may, at the option of the Lessor, be added to and collected as a part of any subsequent rental installment.

4. USE OF PREMISES: The Lessee shall use said premises for the purpose of conducting thereon the following and only the following business: A garage and storage and offices for the use of the Lessee in connection with garage operations, or concessions under-let hereunder to be used with office space, as hereinafter provided.

pairs, notify the Lessor of the Lessee's intention thereof before commencing the work of such repairs. The Lessee shall not make any additions, changes, alterations or modifications to the demised premises without the written consent of the Lessor. The Lessee shall keep all sidewalks abutting upon or adjacent to the demised premises clear, free from rubbish, dirt and/or waste material, in good order, condition and repair, including the replacing of all broken sidewalk lights.

8. **INSPECTION OF PREMISES:** The Lessor shall have the right to enter in and upon the demised premises at any and all reasonable times during said term, without interference or hindrance by the Lessee or the Lessee's agents or representatives, for the purpose of inspecting the same or of making such repairs as the Lessee is bound to make hereunder or for any other legitimate purposes. Said phrase "legitimate purposes" shall include, among other things, the right of the Lessor to enter in and upon the demised premises for the purpose of showing the same to prospective purchasers, mortgagees and lessees, and also to remove signs and other advertising matter placed in, on or upon said premises without the Lessor's written consent, and, in the event that any of the utilities of the building, whereof the demised premises are a part, are located either in whole or in part in the demised premises, to enter the same for the purposes of examining or inspecting said utilities and/or the making of repairs, replacements or substitutions in, to or upon such building utilities.

9. **ASSIGNMENT AND SUB-LETTING:** The Lessee shall not, without the written consent of the Lessor, assign, mortgage, pledge or hypothecate this lease, or any interest therein, or sublet said premises, or any part thereof, and no such consent shall be construed as a consent to any subsequent assignment or subletting. No assignment or sublease shall be valid until an executed duplicate original thereof shall have been delivered to the Lessor; nor shall any assignment or sublease release or discharge the Lessee from full liability hereunder. By the acceptance of an assignment the assignee shall become bound to keep and perform all the terms, covenants and conditions herein contained and shall pay the rent herein reserved and accruing from the time of such assignment.

10. **CHARGES FOR PUBLIC UTILITIES:** The Lessee shall pay all charges for water, gas, electricity, heat, telephone service and other public utilities used upon or furnished to the demised premises during said term, and if the Lessee shall fail to pay for any thereof the Lessor may pay said charges for the account of the Lessee and the Lessee shall repay the amount thereof to the Lessor upon demand. ~~In the event that any of said public utilities are furnished to the demised premises through a meter, which measures also such public utility furnished to another tenant or other tenants of the Lessor, then the Lessee shall pay to the Lessor, as special rates on the first day of each calendar month during said term, the following amounts for such public utilities:~~
 for water \$ _____ for gas \$ _____ for electric power \$ _____
 and for electric light \$ _____

11. **SIGNS:** All signs and other advertising matter to be placed on or about the demised premises by the Lessee shall first have the written approval of the Lessor. The Lessor at any time after sixty days prior to the expiration of this lease shall have the right to place any usual or ordinary "No Let" or "To Lease" signs upon said premises.

12. **FIXTURES:** Any additions or improvements to the demised premises shall become at once a part of the realty and belong to the Lessor, but the Lessee shall have the right, at the expiration of the term hereby created, or any other termination of said term by mutual consent, to remove all the Lessee's movable furniture and trade fixtures, if the same can be removed without injury to said premises. Said right of the Lessee to remove such movable furniture and trade fixtures shall be conditional upon the restoration by the Lessee, at the Lessee's sole cost and expense, of the demised premises to the condition they were in before said furniture and trade fixtures were installed. All other fixtures, whether installed by the Lessee or by the Lessor, shall become or remain the property of the Lessor, provided, further, however, that all additions and/or improvements to the demised premises, together with all other fixtures, whether made and/or installed by the Lessee or by the Lessor, for the use and benefit of the Lessee, shall, at the option of the Lessor, be removed by and at the expense of the Lessee, and the demised premises shall be restored, at the option of the Lessor, to the condition in which they were before said additions or improvements and said other fixtures were made or installed.

13. **PERSONAL PROPERTY:** If the Lessee should abandon, vacate or surrender said premises, or be dispossessed by the Lessor by process of law or otherwise, then any personal property belonging to the Lessee and left on the premises shall, at the option of the Lessor, either be deemed to be abandoned or may be stored by the Lessor in any warehouse or elsewhere for the account of and at the cost of the Lessee. The Lessee shall pay all assessments and taxes during said term assessed against or levied upon any personal property situated in said premises, and if the Lessee shall fail to pay the same, then the Lessor may pay the same for the account of the Lessee, and the Lessee shall repay the Lessor the amount thereof upon demand. Should any substantial improvements or additions be made by the Lessee with or without the Lessor's consent to or upon the demised premises and should the taxes assessed upon or levied against said premises on account of such additions or improvements be increased, then such increased taxes shall be paid by the Lessee to the Lessor on demand.

14. **LAW OBSERVANCE:** The Lessee shall strictly conform to all laws and ordinances and all orders, regulations and requirements of any and every legal, governmental or military board, body, commission or officer relating to or in anywise affecting the Lessee's occupancy or use of said premises or the manner of the Lessee's performance of any term, covenant or condition hereof on the Lessee's part to be performed hereunder, as well as to all informal rules and regulations of said authorities, and also to all rules and regulations of the Board of Fire Underwriters of the Pacific Coast, and of any insurance company or association insuring said premises, and the Lessee shall indemnify and keep and save the Lessor forever harmless from any penalties, damages or charges imposed for any violation of the laws, rules, regulations or ordinances referred to, whether occasioned by neglect, omission or willful act of the Lessee or of any person or persons occupying said leased premises during

said term. If the Lessee shall fail or omit to comply with the provisions of this paragraph, in whole or in part, the Lessor may, at the Lessor's option, at the expense and requirements, as above set forth, and any payments made or ordinances and all orders, regulations and requirements, as above set forth, and any payments made or expense incurred by the Lessor in so doing shall be repaid by the Lessee upon demand.

15. **LIENS FOR LABOR OR MATERIALS:** The Lessee shall keep said premises free and clear of any and all liens arising out of the making by the Lessee of any repairs, improvements, additions or alterations to said premises; and should any such lien become a charge against said premises, the Lessee shall promptly pay, satisfy and discharge the same. If the Lessee shall fail to do, then the Lessor may pay the same and any amounts so paid by the Lessor shall be repaid by the Lessee to the Lessor on demand.

16. **LEASE SUBORDINATE TO CERTAIN LIENS:** This lease is and shall at all times be subject, junior and subordinate to all mortgages, trust deeds or bond issues affecting said premises or affecting any underlying lease covering the building and/or the premises whereof the demised premises are a part, or any part thereof, held by the Lessor, and all loss or damage occasioned by storms, rains, snows, or in the condition of said premises of any gas, water, steam, sewer or other pipes, whether any such pipes are upon said premises or not, and any loss or damage occasioned by reason of said premises being out of repair, and any loss or damage arising out of any act or omission of any tenant or sub-tenant or other occupant or occupants ~~within~~ of the demised premises ~~as of any adjoining premises or buildings~~. The Lessee hereby acknowledges that all dangerous places and defects in or about the demised premises are known to the Lessee and will be made and kept safe and secure by the Lessee at the Lessee's sole cost and expense.

17. **ACCIDENT LIABILITY:** The Lessor shall not be liable for and the Lessee shall hold the Lessor harmless against all damages for personal injuries, including death at any time resulting therefrom, and all damages to any property by reason of any latent or patent defect in the construction of or in the condition of said premises during said term, and all loss or damage occasioned by storms, rains, snows, or leakage, bursting or stoppage of any gas, water, steam, sewer or other pipes, whether any such pipes are upon said premises or not, and any loss or damage occasioned by reason of said premises being out of repair, and any loss or damage arising out of any act or omission of any tenant or sub-tenant or other occupant or occupants ~~within~~ of the demised premises ~~as of any adjoining premises or buildings~~. The Lessee hereby acknowledges that all dangerous places and defects in or about the demised premises are known to the Lessee and will be made and kept safe and secure by the Lessee at the Lessee's sole cost and expense.

18. **PLATE GLASS INSURANCE:** The Lessee shall, during said term, keep all plate glass belonging to the demised premises insured in such amount and in such insurance companies as shall be satisfactory to the Lessor, loss, if any, payable to the Lessor; and the Lessee shall pay the premiums therefor and deliver the policy or policies forthwith to the Lessor; and, if the Lessee shall fail to do, the Lessor may effect such insurance and pay the premiums therefor and the Lessee shall repay the Lessor the amount thereof on demand.

19. **LESSOR'S RIGHTS AND REMEDIES:** All the terms, covenants and conditions on the part of the Lessee to be kept and performed hereunder are conditions precedent to be kept and performed by the Lessee to entitle the Lessee to continue in the possession of said premises hereunder, and if the Lessee shall make default either in the payment of said rent or in the observance or performance of any other of said terms, covenants and conditions, or if the Lessee shall file a voluntary petition in bankruptcy, or be adjudicated a bankrupt, or commit any act of bankruptcy, or be adjudged an insolvent debtor under the insolvent debtor or bankruptcy laws of any state, or if any execution or attachment be issued against the Lessee or against any of the Lessee's property or effects and if as a result thereof there shall be an actual or attempted taking or occupation of the demised premises by someone other than the Lessee, or if the Lessee shall make a general assignment for the benefit of the Lessee's creditors or be placed in liquidation, or if in any judicial action or proceeding in any court against the Lessee, a receiver, liquidator, keeper, or other officer or agent shall take charge of said premises, or of the business conducted therein, or if this lease, or any interest or estate created hereby, shall vest in any other person or persons by operation of law or otherwise, except by the written consent of the Lessor and except by the death of an individual lessee, or if the Lessee shall fail to take possession of said premises hereunder or shall abandon or waive said premises, then in each or any of said events the Lessor shall have the right and option to terminate all the Lessee's rights hereunder, and to enter upon said premises either with or without process of law and remove all persons and property therefrom and re-possess and enjoy said premises as of the first and former estate of the Lessor; but no such re-entry by the Lessor shall be construed as an election to terminate this lease unless written notice to that effect shall be given by the Lessor to the Lessee; except that if this lease or any interest or estate created hereby, shall, as aforesaid, vest in any other person or persons by operation of law or otherwise, except as aforesaid, then this lease shall ipso facto terminate and the Lessee shall be released from the liability to pay any further rental not in arrears, and in no event shall this lease be treated as an asset of the estate of the Lessee in case of bankruptcy or as an asset of the Lessor after the Lessee is exercised of any right or option of re-entry.

If the Lessor shall commence any summary action or proceeding under any unlawful detainer act or similar statute for the forfeiture of this lease and/or for the possession of said premises, then the Lessor shall have the right to have a receiver appointed by the court, without any notice to the Lessee, to take possession of said premises and collect any rent that may be or become due from any sub-tenant and to hold the same during the pendency of said action, subject to final disposition by the court; and, if such a receiver be appointed at the instance of the Lessor, such receiver may, if it be necessary or convenient in order to collect such rents and the profits derived from any business carried on on said premises, conduct the business of the Lessee then being carried on upon said premises and take possession of any personal property belonging to the Lessee and used in the conduct of such business and use the same in conducting such business on said premises, without

compensation to the Lessee. The Lessee hereby appoints the Lessor as the Lessee's attorney-in-fact with irrevocable power during the pendency of any such summary proceeding and until the appointment of such a receiver, to collect from any and all sub-tenants the rents due or to become due from any such sub-tenant during the pendency of such proceeding. The Lessee hereby waives any right of redemption of said premises that is now or may hereafter be given by any such statute, or otherwise, and also waives any and all notices to dispossess the Lessee preliminary to the institution of any such summary proceeding.

If the Lessee shall fail to take possession of or shall abandon, vacate or surrender said premises (unless the Lessor shall by notice in writing accept a surrender of said premises and therein expressly release the Lessee from all obligations hereunder), then the Lessor shall have the right and option to re-entr said premises, with all the aforementioned rights incidental to re-entry, and re-let said premises for the account of the Lessee on such rentals, terms and conditions as the Lessor may deem proper, using reasonable endeavors to secure a reasonable rental, and to apply any moneys that may be collected on account of such rentals, less the expenses of renting said premises and collecting said rentals, on account of the rentals, to be paid by the Lessee hereunder and to hold the Lessee liable for any deficiency, but no such re-letting shall operate as a waiver of any right or remedy of the Lessor against the Lessee. No such re-entry by the Lessor shall be construed as an election to terminate this lease unless written notice to that effect shall be given by the Lessor to the Lessee. The Lessee shall pay any such deficiency of rental month by month on the demand of the Lessor.

The Lessee shall indemnify the Lessor against and shall pay and discharge any and all reasonable or proper costs and expenses (including all reasonable attorneys' and counsel fees) that, may at any time or times result from or arise out of, or that the Lessor may be put to, to sustain or incur by reason of any default or failure on the part of the Lessee to comply in any respect with or to observe any requirement or provision of this lease or that the Lessor may sustain, be put to or incur in enforcing or properly seeking to enforce any of the terms, covenants or conditions hereof; and if any suit or action should be commenced against the Lessor by the Lessee or any assignee or sub-tenant of the Lessee in respect of any matter arising out of this lease, and the Lessor shall wholly or partly prevail in any such suit or action, then and in that event the Lessee shall also pay the costs and expenses of the Lessor in connection with any such suit or action together with the Lessor's reasonable attorneys' and counsel fees therein. Whenever any such attorneys' or counsel fees are paid or incurred by the Lessor in connection with any court proceedings whatsoever in respect of any matter arising out of this lease the reasonable amount thereof shall, if possible, be determined and fixed by the court having jurisdiction of any such court proceeding.

Each and all of the various rights, powers, options, recourses and remedies of the Lessor contained or provided for in this lease shall be construed as cumulative and no one of them as exclusive of the other or as exhaustive of any rights or remedies allowed by law. Recourse by the Lessor to any deposit, guaranty, collateral assignment, or other security for the Lessee's performance of all or any of the terms, covenants and conditions herein shall be cumulative, independent of and in addition to any and all other rights and remedies of the Lessor, whether contained in this lease or in another instrument, or otherwise, or provided for by law, and the Lessor shall not be required to exhaust or look to any such security before exercising or prosecuting any of such other rights or remedies. The Lessor may transfer and/or deliver any such security, as such, to the purchaser of the reversion, in the event that the reversion be sold, or the underlying lease or leases held by the Lessor be assigned, and thereupon the Lessor shall be discharged from any further liability in reference thereto. No delay of the Lessor in enforcing any right, remedy, privilege or recourse accorded to the Lessor, or which the Lessor may be or become entitled to recoveries thereon, shall affect, impair, diminish, suspend or exhaust any of such rights, remedies, privileges or recourses. In the event of a breach or threatened breach by the Lessee of any of the terms, covenants, conditions or provisions of this lease, the Lessor shall be entitled to apply for and to obtain an injunction to prevent said breach or threatened breach, and the Lessee hereby waives the benefit of every statute and/or rule declaring or defining either remedies or rights by or for injunction that may otherwise operate to prevent the issuance of any injunction against the Lessee. If the Lessee should make default in the fulfilling, keeping, observing or performing of any or all of the covenants, conditions or agreements in this lease set forth and contained on the part of the Lessee to be fulfilled, kept, observed and performed, the Lessor may at the Lessor's option immediately or at any time thereafter, without notice, perform the same for the account of the Lessee and the Lessee shall immediately, upon demand, pay the Lessor the moneys expended and/or the expenses incurred by the Lessor in connection therewith.

20. **CONDEMNATION AND EMINENT DOMAIN:** If the demised premises, or any part thereof, or the building of which the same are a part, or any part of such building shall be condemned or if the same or the land upon which said building is erected, or any part of said land, should be taken by virtue of the exercise of the power of eminent domain or for any public or quasi public improvement or purpose, the Lessor shall have the right to cancel and terminate this lease and end the term thereby demised, by giving the Lessee five days' personal or written notice of the exercise of such right, and upon the giving of such notice this lease shall expire and be cancelled and terminated and the term thereby demised cease to an end by lapse of time on the fifth day thereafter, as if that day were the date in this lease distinctly fixed for the expiration of the demised term, and the Lessee shall and hereby agrees to vacate and surrender the demised premises five days after the giving of such notice. Should the notice be in writing, it shall be enclosed in a sealed, post-paid envelope and addressed to the Lessee at the demised premises, and be sent to the Lessee by registered United States mail, and the five day period afove referred to shall commence to run from the date of such mailing. ~~If in any condemnation or other similar proceeding the same should be made to take the Lessee's and Lessee's shall have the right to select or receive the same on any part thereof, and the Lessee hereby assigns and transfers to the Lessor any and all such benefits for damages.~~

21. **ABATEMENT:** If during said term, under any present or future laws, or any other governmental authority, any order of abatement or any order or judgment preventing the use of said premises by the Lessee

shall be made upon the ground that said premises or any part thereof constitute a nuisance, or are used, or have been used in violation of law by the Lessee, or the Lessee's agents, officers or employees, then the Lessor shall not be released thereby from any of the Lessee's liabilities or obligations hereunder, including the Lessee's liabilities and/or obligations to pay the reserved rental hereunder.

22. **DESTRUCTION OF LEASED PREMISES:** If the demised premises, or the means of access thereto, be damaged by fire, the Lessee shall give immediate notice thereof to the Lessor, and the damage thereto shall be repaired as speedily as possible, after the receipt of such notice, by and at the cost and expense of the Lessee. If the demised premises be rendered totally or partially untenable as a result of damage thereto by fire, and the damage be not due to any fault or neglect on the part of the Lessee or the Lessee's agents, clerks, servants, employees, customers, patrons or visitors, from and after receipt by the Lessor of the Lessee's notice of the damage, rent shall (a) cease until the repairs shall have been completed, if the demised premises are wholly untenable; or (b) abate proportionately until the repairs shall have been completed, if the demised premises are partially untenable; i. e. in the same proportion that the untenable part of the demised premises bears to the entire demised premises. If, as a result of fire, the elements or other casualty or catastrophe the building of which the demised premises are a part be destroyed or so damaged (whether the demised premises be damaged or not) that the Lessor shall deem it expedient to rebuild, the Lessor shall have the right to vacate and terminate this lease and end the term thereby demised by giving the Lessee, within thirty days from the date of the destruction or damage, five days' personal or written notice of the exercise of such right, and upon the giving of such notice this lease shall expire and be cancelled and terminated, and the term thereby demised come to an end by lapse of time on the fifth day hereafter, as fully and completely as if that day were the date in this lease distinctly fixed for the expiration of the demised term, and the Lessee shall and hereby agrees to vacate and surrender the demised premises five days after the giving of such notice. Should the notice be in writing, it shall be enclosed in a sealed, post-paid envelope and addressed to the Lessee at the demised premises and be sent to the Lessee by registered United States mail, and the five day period above referred to shall commence to run from the date of such mailing. Should any question arise between the Lessor and the Lessee as to whether or not repairs have been made with reasonable dispatch, due allowance shall be made for delays connected with the adjustment of the loss under the insurance policies and those caused by or due to what are commonly known as "labor troubles".

23. **WAIVERS:** None of the covenants, terms or conditions of this lease to be kept and performed by the Lessee shall in any manner be waived, amended, altered, modified or abandoned, except by a written instrument fully signed and delivered by the Lessor, and not otherwise, and no act or acts, omission or omissions, or delays, or series of acts or omissions, or waiver, acquiescence or forgiveness by the Lessor as to any failure of performance either in whole or in part by the Lessee of any of the covenants, terms or conditions of this lease shall be deemed or construed to be a waiver by the Lessor of the right at all times in the future to insist upon the full and complete performance by the Lessee of each and all of the said covenants, terms and conditions hereafter to be kept or performed hereunder; nor shall an acceptance of surrender of this lease be effected without a written consent thereto by the Lessor.

24. **NOTICES:** All notices or demands from the Lessee to the Lessor, whether under any provision hereof or under any provision of law, shall be made in writing and mailed by registered mail, postage thereon fully prepaid, addressed to the Lessor at the address at which the rentals hereunder shall be payable as hereinbefore provided and all such notices or demands from the Lessor to the Lessee shall be made in writing mailed by registered mail, postage thereon fully prepaid, addressed to the Lessee at the address of the demised premises, or by leaving such notice or demand at said premises with the Lessee or with some person employed by the said Lessee, or apparently in charge of said premises, over the age of eighteen years, or, if said premises be closed, by depositing said notice or demand under the front door of said premises between the hours of nine o'clock A. M. and five o'clock P. M. in an envelope addressed to the Lessee.

25. **YIELDING POSSESSION:** On the last day of said term or other prior termination of this lease, the Lessee shall peaceably and quietly leave, surrender and yield up to the Lessor the demised premises in good order, condition and repair, reasonable use and wear thereof and damage by the elements, not happening through any negligence of the Lessee, excepted.

26. **HOLDING OVER:** Any holding over after the expiration of said term with the consent, express or implied, of the Lessor, shall be a tenancy from month to month, at a monthly rental, payable in advance, equal to the highest monthly installment of rent payable hereunder. Such month to month tenancy shall be subject to termination at the end of any month on three (3) days' written notice to the Lessee, and shall otherwise be on all the terms, covenants and conditions herein contained, so far as applicable.

27. **QUIET POSSESSION:** The Lessee, keeping and performing all of the terms, covenants and conditions hereof on the Lessee's part to be kept and performed hereunder, shall at all times during said term peaceably and quietly have, hold and enjoy the said premises, without suit, trouble or hindrance from the Lessor; subject, however, to the mortgages, trust deeds or bond issues heretofore mentioned and provided for, also the provisions of any underlying lease held by Lessor covering in whole or in part the demised premises or the building or premises of which same are a part. The Lessee reserves the right to acquire all persons who may work adjacent to any building which is or may be located in the same building in which the demised premises are located to come to the front of the main entrance to said building, and if necessary to extend said line down the sidewalk in front of the demised premises, and the extension of such time on the airwalk in front of the demised premises shall not be a breach of any term, covenant, condition or agreement on the part of the Lessor, nor shall anything benefit to the contrary be construed.



Exhibit 3-C—(Continued)

28. Interpretation: The language in all parts of this lease shall in all cases be construed as a whole and simply according to its fair meaning, and not strictly for or against either the Lessor or the Lessee.

If the designation of the Lessee in the introductory portion of this lease shall include more than one individual, then all of such individuals shall be jointly and severally liable hereunder and the term "Lessee" as herein used shall connote both the disjunctive and the conjunctive sense.

Wherever in this lease any words of obligation or duty regarding either party are used, such words or expressions shall have the same force and effect as though made in the express form of covenants.

Each and all of the covenants, agreements, obligations, conditions and provisions of this lease shall inure to the benefit of and shall bind (as the case may be) not only the parties hereto, but each and all of the heirs, administrators, executors, successors and assigns of the respective parties hereto, or either of them; and whenever and wherever a reference is made to the Lessor herein or to the Lessee herein, such reference shall be deemed to include the respective heirs, administrators, executors, successors and assigns of the Lessor or the Lessee as the case may be; provided, however, that nothing contained in this paragraph or provision shall be construed to permit or validate any assignment of any interest of the Lessee contrary to the provisions hereinbefore set forth in respect of any assignment by the Lessee.

Exhibit 3-C—(Continued)

29. Special Provisions:

(a) As further rent hereunder, Lessee agrees to pay prior to delinquency all real property taxes, rates, assessments, charges of every name, nature and kind whatsoever, which may be levied, assessed or imposed upon the rear theatre building only, the leasehold of Lessee or upon the estate hereby created, or upon Lessor by reason of ownership of the fee underlying this lease during the term of this lease. With reference to such taxes, rates, assessments and charges, for the first year of the term the same shall be divided between the Lessor and the Lessee equally, but for the last year of the term, or for the year during which this lease may be sooner terminated, the same shall be prorated between the Lessor and the Lessee, and the Lessee shall be obligated to pay only his prorata share thereof, determined on the basis of the number of months of the then current fiscal year that this lease shall be in effect. If the Lessee in good faith shall desire to contest the validity or amount of the taxes, rates, assessments or charges he shall notify the Lessor in writing of his intention so to do, and Lessee may thereupon defer the payment of the same so long as the validity or amount of the same shall be contested by the Lessee in good faith and by appropriate proceedings. The Lessor agrees to render to Lessee all assistance reasonably possible without expense to the Lessor in contesting the validity or amount thereof, including joining in and signing any protests or pleadings which the Lessee

Exhibit 3-C—(Continued)

may deem it advisable to file. It is agreed that should any rebate be made on account of sums paid by Lessee, or should any award be made in any way arising out of or in connection with the work or improvements for which the same has been levied, then the amount of such rebate or award shall belong to and be paid to the Lessee.

(b) The Lessor, in this paragraph grants to the Lessee the right to install as many floors as the Lessee may find necessary for the proper operation of a garage and storage purposes, however it is agreed that the Lessee hereunder is obligated to install only the basement floor, first and second floors.

Lessee agrees to remodel, alter and reconstruct the leased premises for the purpose of conducting a garage and maintaining storage thereof, as well as offices for the use of the Lessee in connection with garage operations or concessions which may be underlet hereunder to be used with office space, and all such alteration, change and reconstruction shall be at Lessee's sole cost and expense; and in this respect, the Lessor consents to such alteration, change and reconstruction, provided the same is made strictly in accordance with certain plans and specifications bearing the date of....., and the written approval of the Lessor endorsed thereon, for which Permits were or will have been granted by the proper public authorities. The Lessee is hereby further granted the right to erect additional floors in said building, in accordance with plans and spe-

Exhibit 3-C—(Continued)

cifications already approved in writing, provided the same are used for garage and storage purposes; that the said plans and specifications are hereby incorporated herein by reference and made a part hereof. The Lessee further agrees that the remodeling, reconstruction and change of the first and second floors of said demised premises shall be completed no later than May 1, 1950; and in this respect, it is further mutually understood and agreed that without regard as to the date of said completion, the rental obligations on the part of the Lessee shall commence on May 1, 1950.

(c) All Permits of every kind and character for the remodeling, reconstruction and change of the demised premises must be procured by the Lessee from the proper governmental authorities, whether city, county, state and federal, before the commencement of the work, and all such Permits shall be made available at all times for inspection by the Lessor; and in this respect, the Lessee agrees that no work shall be commenced unless and until said Permits are issued and outstanding and remain unrevoked, and the work to be done in respect thereto must be authorized by the Lessor in writing.

(d) No change is to be made in the existing fire escape and stair facilities which are now connected to the south side of the rear theatre wall, and also connected with the rear part of the office building. The said fire escape and stair facilities are to be left intact for the safety of the tenants occupying the said office building, and in the event the fire

Exhibit 3-C—(Continued)

escapes on the front of the office building lead to any of the said outlets hereinbefore referred to, then the same may be used by the parties hereto and by the tenants occupying the office building adjacent to the demised premises.

(e) The Lessee agrees to require from his contractor that he will carry public liability insurance from the commencement of the work to be done and while it is in progress, and that such insurance will provide that the Lessee and Lessor will be held harmless from any and all responsibility of accidents during the remodeling, reconstruction and change, and the Lessee agrees to supply to the Lessor duplicate originals of such insurance policies.

(f) Lessee agrees to notify the Lessor in writing immediately when the contract for the remodeling, reconstruction and change has been signed, and the granting of the Permits hereinbefore referred to has been accomplished, in order to allow the Lessor to place a non-responsibility notice on the building before any work is started, and permit the Lessor to record the original notice in the Recorder's office of the City and County of San Francisco, and otherwise protect itself against liens for labor, and materials, referred to in Paragraph 15 hereof.

(g) Lessor agrees not to remove the marquee frame and roof thereto, and the same may be used by the Lessee. The Lessor agrees that all personal property remaining in the leased premises will be removed by it at its own cost and expense prior to the time of the commencement of the remodeling and

Exhibit 3-C—(Continued)

reconstruction. All electric motors, theatrical switchboards, front doors, ventilators and fans, chairs, drapes, electric fixtures and carpets now installed in the leased premises, are reserved to the Lessor and are not included in the within lease. The Lessor agrees to remove the said miscellaneous property immediately when notice has been received by it in writing from the Lessee that the contracts for remodeling and reconstruction have been let and Permits have been granted for the commencement of the work to be done in connection therewith. Lessor agrees however to leave for Lessee's use such electric panels and ventilating fans with motors which may be necessary for Lessee's use of the premises.

(h) It is further agreed between the parties that in the event that any switches, meters, and other installations are left in any of the basements of the property occupied by the Lessor or its tenants, which are being used directly or indirectly in the building facing on the Eddy Street side of No... Eddy Street, or belonging to any of the tenants occupying any portion of said building, permission is hereby granted to the Lessor and its tenants, or any of them, to enter such premises, even though part of the demised premises, wherever and whenever necessary. The main switch is to be split and direct wire to be placed for the use of the Lessee herein, so that such electricity and power as the Lessee may use is to be included on the Lessee's own meter, and all work to be done at Lessee's own cost and expense.

Exhibit 3-C—(Continued)

(i) In the event the Lessor shall determine to sell the property herein leased at any time during the term hereof, the Lessee shall have the first option for a period of thirty days from the time that written notice is given by the Lessor to the Lessee of its willingness to sell the same; purchase price of said property to be such sum as may be mutually agreed upon; and if a satisfactory agreement is reached concerning the sale of said property, the Lessee shall have sixty days within which to consummate the said sale by the payment of the full purchase price thereof.

(j) In the event of any increase of insurance premiums caused by the reconstruction, remodeling and change hereinbefore referred to, or caused by the nature of the business carried on by the Lessee, or caused by the use and maintenance upon the demised premises of any gasoline, kerosene, distillate, or any petroleum product, or any explosive or inflammable substance, or for any other reason whatsoever, such increase of insurance premiums shall be paid by the Lessee to the Lessor on demand; and in this respect, the Lessor agrees throughout the term of the lease to carry fire insurance upon the leased premises in an amount equal to at least ninety per cent of the insurable value above the foundation walls, and shall supply to Lessee certificates of insurance evidencing such coverages.

(k) In the event of either a total or partial destruction of the demised premises, the Lessor agrees

Exhibit 3-C—(Continued)

to apply to the cost of repair or restoration of said premises so much of the funds as the Lessor may receive from the proceeds of policies of insurance, and in case the proceeds of insurance policies are insufficient for the complete restoration or rebuilding of the premises to the condition in which they were prior to such destruction, the Lessee agrees to assume full responsibility for the balance of the cost of such repair and restoration.

(1) Notwithstanding anything herein to the contrary set forth, the Lessee may at any time, or from time to time during the term of this lease, sub-let all or any portion of the demised premises, subject, however, to the following conditions; that no sub-letting shall operate to release or relieve Lessee from his obligations or liability under this indenture, or any of them, and that such sub-letting shall be subject to all, and in no wise impair any, of the terms, covenants and conditions of this lease to be kept and performed by Lessee; and provided further, that such sub-letting must be for use similar to the uses for which the original tenant has been permitted to use and occupy the demised premises; and provided further, that Lessee shall as a condition to any such sub-lease, within ten days after making any sub-lease, notify the Lessor ~~in~~ writing of the name, place of business and residence and address of the sub-lessee, and deliver to the Lessor an executed copy of the sub-lease; and provided further, that such sub-lease shall be duly executed and acknowledged by both the sub-lessor

Exhibit 3-C—(Continued)

and the sub-lessee before a Notary Public, and that such sub-lease shall contain a clause to the effect that the sub-lessee agrees to observe all of the terms, covenants and conditions in this lease contained, save and except the rental accruing hereunder, and that said sub-lessee will comply with and be bound by all of the same; and unless the conditions hereinbefore set forth are complied with, such sub-letting shall at the option of the Lessor be ineffectual for all purposes.

(m) The Lessor hereby grants to Lessee the right at any time following the completion of the reconstruction, remodeling and change in the leased property as above set forth, to assign all of Lessee's right, title and interest in this lease to a California corporation hereafter to be formed, for the purpose of conducting the business of the Lessee in the demised premises pursuant to the terms of this lease, whose principal place of business shall be in San Francisco. This right to assign, however, is granted upon the following conditions:

(1) That Lessee at the time of assignment is not in default in any payment of any rentals or the performance of any of the covenants set forth in this lease.

(2) That Lessee has exhibited to Lessor receipted bills showing that the cost of the work concerning the reconstruction, remodeling and the changes in the leased property has been paid in full.

(3) That Lessee shall procure and deliver to the Lessor a letter from a responsible title insurance

Exhibit 3-C—(Continued)

company in San Francisco certifying that a notice of completion of the said work hereinbefore referred to has been recorded in the Office of the Recorder of the City and County of San Francisco, and 60 days have expired since the recording thereof, and that no liens have been filed against the property upon which the demised premises are situated for labor or services performed or materials furnished in connection with said work.

(4) That Lessee has notified Lessor in writing not less than five days prior to such assignment of the name of the corporation to which this lease is to be assigned, together with the names of the President and Secretary thereof, as well as the Directors thereof, and the address of the principal place of business of said corporation.

(5) That said assignment shall be in such form as is generally used, excepting that such assignment shall not change or modify any of the terms or covenants herein contained, and shall contain an acceptance of the said lease by the new Lessee, under the terms of which acceptance the new Lessee shall agree to pay all of the rental provided for in the lease and to perform all of the covenants set forth in said lease.

(6) That within five days after the execution of said assignment and acceptance thereof, the Lessee shall deliver to the Lessor a fully executed copy of said assignment and acceptance, together with a copy of a resolution passed at a meeting of the Board of Directors of said corporation at which

Exhibit 3-C—(Continued)

a quorum was present and voting, which resolution shall authorize the officers of said corporation to execute the acceptance of said assignment. Said copy of the resolution is to be certified to by the Secretary of said corporation as being a true and correct copy of said resolution, and is to have the corporate seal attached thereto.

Lessee agrees that this consent to the assignment of said lease shall not be construed as a consent to a further assignment of this lease or a waiver of any of the provisions hereof.

(n) Lessee agrees during the full term of this lease to carry public liability insurance and a so-called garage insurance policy covering the demised premises, its appurtenances and sidewalks fronting thereon, in an amount of \$100,000.00 for injury or death to any one person, and \$500,000.00 for injury or death to any number of persons in any one accident, in a company satisfactory to the Lessor, which said policy shall be in the joint names of Lessor and Lessee, and the Lessee agrees to pay the premiums therefor and to deliver said policies or duplicates thereof to the Lessor, and the failure of the Lessee either to effect said insurance in the names herein called for, or to pay the premiums therefor, or to deliver said policies or duplicates thereof unto Lessor, shall permit the Lessor itself to effect said insurance and to pay the requisite premiums therefor, which said premiums shall be repayable unto it with the next installment of rental, and the failure to repay the same shall carry with

Exhibit 3-C—(Continued)

it the same consequence as failure to pay any installment of rental. The insurer mentioned in this paragraph shall agree by endorsement upon the policy or policies issued by it or by independent instrument furnished to Lessor, that it or he will give the Lessor fifteen days' written notice before the policy or policies in question shall be altered or cancelled; and in this respect Lessee further agrees that before the commencement of the remodeling or reconstruction of the demised premises, he will have included in said policies of insurance coverage of said remodeling and/or reconstruction, as follows:

(1) Property damage insurance in the sum of \$100,000.00, protecting the Lessor, its tenants, and the general public, from any loss or damage to their property caused by the remodeling and/or reconstruction of the demised premises and/or the building of which the demised premises are a part.

(2) Public liability insurance in the names of the Lessor and the Lessee, protecting them from any loss or damage occasioned by injury to anyone whomsoever caused by the remodeling and/or reconstruction of the demised premises and/or the building of which the demised premises are a part.

All of these insurance policies are to be written by responsible insurance companies of established reputation, and Lessee agrees to deliver the original or a duplicate thereof of each policy to the Lessor at least seven days before the commencement of any work on the building.

Exhibit 3-C—(Continued)

(o) Notwithstanding anything herein to the contrary contained, the Lessor agrees that the Lessee shall have the right to place a sign over the roof of the rear part of the said building, provided, however, that the Lessee shall assume full responsibility for its installation and maintenance, together with the procurement of adequate public liability insurance in connection with said sign, and the Lessee shall likewise assume full responsibility for any damage that the installation or maintenance of said sign may cause to the roof of the demised premises. Lessee shall further have the right to erect and maintain a suitable sign and marquee over the entrance to said leased premises.

(p) Notwithstanding anything herein to the contrary set forth, it is agreed by and between the Lessor and the Lessee that in any proceeding by the public authorities, by condemnation or otherwise, whereby all or part of the demised premises are taken or sought to be taken for any such purposes, the Lessor and/or the Lessee herein shall each be free to make claim against the condemning party for the amount of damage claimed, and the Lessee shall have the same right to an award for any damages Lessee may sustain even though the Lessor avails itself of the option hereby given to the Lessor to terminate the unexpired term of this lease.

(q) Notwithstanding anything herein to the contrary contained, if as a result of fire, the elements, or other casualty or catastrophe, the building of which the demised premises are a part be destroyed

Exhibit 3-C—(Continued)

or so damaged that the Lessor shall decided not to rebuild, and if the Lessor exercises its right to cancel and terminate this lease a(s) provided in Paragraph 22 hereof, then, and in any such event, the Lessor agrees to pay to the Lessee the unamortized portion of the capital expenditures incurred by the Lessee in connection with the remodeling, reconstruction and changes in the demised premises hereinbefore referred to; provided, however, that such fire, casualty or catastrophe shall not have been caused by the carelessness or the negligence of the Lessee; and provided, as above set forth, there shall have been exhibited to and retained by the Lessor all receipted bills showing the cost of the remodeling, reconstruction and changes made in the demised premises by the said Lessee.

(r) The Lessee acknowledges that the Lessor would not have entered into this lease agreement but for the guarantee by Herman Hertz annexed hereto and made a part hereof, and entered into contemporaneously herewith.

GUARANTEE

In Consideration of the execution and delivery of the foregoing lease contemporaneously with the execution and delivery by the undersigned of this guarantee, the undersigned does hereby guarantee the performance of all of the terms, covenants and conditions of the annexed and foregoing lease by the Lessee therein designated during the first two years of the term therein provided for; provided,

Exhibit 3-C—(Continued)

however, that the liability of the undersigned, as guarantor, shall not exceed the sum of \$10,000.00; and in the event that the undersigned guarantor is required to pay all or any part of the sum herein guaranteed, he reserves the right at his option to require an assignment of the said lease from the Lessee or from the corporation assignee referred to in the annexed lease, in which event, upon the execution and delivery of such assignment the undersigned agrees to perform all of the terms, covenants and conditions of the said lease, all with the same force and effect as if the undersigned had been designated as the original Lessee; and in any such event, it is further understood and agreed that the Lessor herein agrees to such assignment; and the undersigned further acknowledges that the agreement on the part of the Lessor to any such assignment to the undersigned shall not be construed as a consent to a further assignment of the said lease by the undersigned, or a waiver of any of the provisions of said lease. In the event that the undersigned does not exercise the aforementioned option, his obligations shall be limited as aforesaid to the sum of \$10,000.00, which shall be payable in lawful money of the United States to the said Lessor.

Dated: October 6, 1949.

/s/ Herman Hertz, Guarantor

In Witness Whereof, the respective parties hereto have hereunto subscribed their names, and, if either party be a corporation, then the corporate name of

Exhibit 3-C—(Continued)

such corporation has been hereunto subscribed and its corporate seal hereto affixed by its officers thereunto duly authorized, the day and year hereinbefore first written.

.....
.....

EXHIBIT 4-D

Executive Offices Blumenfeld Theatres, 70 Eddy Street, San Francisco 12, California. Yukon 6-1282. April 24, 1950

Mr. M. L. Rose
M. L. Rose Company, Inc.
Flood Building, San Francisco, California

Re: Tivoli Theatre Property

Dear Mr. Rose:

You are hereby given authority to negotiate for the sale of the above captioned property to Mr. Herman Hertz et al, upon the following conditions:

1. The sale price is to be \$350,000.00.

2. The sum of \$25,000.00 is to accompany the sale agreement, in consideration for which the Purchaser shall have an option to conclude the deal within one (1) year.

3. If the deal is concluded within the option period herein specified, the purchaser shall pay to the Seller \$225,000.00 in cash from the proceeds of a first Deed of Trust. In the event the lending institution will only lend a lesser amount, but not lower than \$200,000.00, then the Purchaser shall

make up the deficiency between the amount of the loan and the \$225,000.00 within three years. All sums received from the proceeds of the loan, even though in excess of \$225,000.00, shall be payable to the Seller.

4. The Seller agrees to carry a second Deed of Trust in the amount of \$100,000.00 behind a life insurance company loan, payable at the rate of \$15,000.00 per year and bearing interest at the rate of four and one-half ($4\frac{1}{2}\%$) per cent per annum.

5. In the event the Purchaser does not conclude the purchase of the property within one (1) year, the \$25,000.00 mentioned under No. 2 above shall remain with the Seller as additional lease deposit under that certain lease dated the 6th day of October, 1949, between Blumenfeld Enterprises, Inc., as lessors, and Harry Morofsky, as lessee, and shall be deducted from rentals at the end of the lease term. In consideration of this additional lease deposit, the lessors grant to the lessee permission to demolish the rear portion of the premises for the purposes conforming to said lease and further provided the lessee shall furnish to the lessor modified plans showing the proposed basement and ground floor development and shall secure from the lessors written permission for said development. All of the cost of demolishing and improving shall be at the lessee's sole cost and expense.

6. The Seller, as the lessor, expressly retains all of their rights under the aforementioned lease dated October 6, 1949, and makes no waiver of any of the conditions of said lease, including but not limited

to the \$10,000.00 guarantee by Mr. Herman Hertz.

7. In the event the Purchaser exercises his option to purchase within the one (1) year period, then he shall be given credit by the Seller for the net gross profit from the operation of all of the premises in the interim period. The Seller shall deduct from said rentals, taxes, insurance, utility costs and all other legitimate items of expense.

8. In the event the option is exercised and the sale consummated, the Seller agrees to take from the Purchaser and the Purchaser agrees to extend to the Seller a lease covering the third floor of the office portion of the building for a period of ten (10) years at a rental of \$400.00 per month, with a further option for an additional ten (10) year period. All other leases now in force and effect shall be transferred at the time of the sale to the Purchaser.

The parties hereto agree that this document sets forth only the basic agreement and that both parties will execute a formal sales agreement when it is prepared by their attorneys.

Yours very truly,

Blumenfeld Enterprises, Inc.

/s/ By A. Blumenfeld

AB:lrz [In longhand]: Check received

Accepted: 4/24/50

/s/ By Harry Morofsky, Purchaser

/s/ By Harry Morofsky, Lessee

Witness: /s/ M. L. Rose.

EXHIBIT 5-E

AGREEMENT

This Agreement, made and entered into in the City and County of San Francisco, State of California, on the 23rd day of February, 1951, by and between Blumenfeld Enterprises, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of California, herein called the "Seller", and Harry Morofsky, of San Francisco, California, herein called the "Buyer",

Witnesseth:

Whereas, on October 6, 1949, the parties hereto made and executed a written Lease wherein and whereby Seller leased to Buyer certain portions of the Tivoli Theatre Building, commonly known and designated as No. 70 Eddy Street, San Francisco, California, which demised premises are more particularly described in said Indenture of Lease; and

Whereas, on April 24, 1950, the Seller in writing agreed to give Buyer an option for the purchase of the entire Tivoli Theatre Building upon certain terms and conditions set forth in said writing; and

Whereas, the parties hereto did in said writing of April 24, 1950, agree to reduce their agreement to a formal document prepared by their respective attorneys; and

Whereas, the parties hereto now desire to execute said formal agreement setting forth all of the terms of their said agreement;

Exhibit 5-E—(Continued)

Now, Therefore, It Is Hereby Mutually Agreed as follows:

1. In consideration of the sum of Twenty-Five Thousand (\$25,000.00) Dollars paid by Buyer to the Seller, the receipt of which was acknowledged on May 1, 1950, and provided as a condition precedent that the Buyer fully performs all the terms, covenants and conditions of the aforementioned Lease of October 6, 1949 at the times and in the manner therein required and prior to the exercise of the within option,

(a) Seller hereby gives to Buyer the exclusive right to buy, on or before October 1, 1951, at 12:00 o'clock noon, standard time, all that certain land and building in the City and County of San Francisco, State of California, generally known and designated as the entire Tivoli Theatre Building, No. 70 Eddy Street, San Francisco, California, and more particularly described as follows:

Beginning at a point on the northerly line of Eddy Street, distant thereon 68 feet and 9 inches easterly from the easterly line of Mason Street; running thence easterly along said line of Eddy Street 68 feet and 9 inches; thence at a right angle northerly 89 feet and 6 inches; thence at a right angle easterly 75 feet to the westerly line of Glasgow Street; thence at a right angle northerly along said line of Glasgow Street 96 feet; thence at a right angle westerly 75 feet; thence at a right angle southerly 10 feet and 6 inches; thence at a right angle westerly 68 feet and 9 inches; and thence at

Exhibit 5-E—(Continued)

a right angle southerly 175 feet to the point of beginning.

Being part of 50 Vara Block No. 171.

(b) Seller agrees to convey to the Buyer a merchantable title to said real property, free and clear of all liens and encumbrances, except those liens and encumbrances hereinafter specifically named and mentioned.

(c) Seller agrees to assign and deliver to the Buyer by proper instruments of assignment the following leases:

1. Morofsky lease.
2. Variety Club lease.
3. Bar lease.

All deposits on each of said leases as security or otherwise, including but not limited to the deposit of Twenty Five Thousand (\$25,000.00) Dollars on the Morofsky lease, shall be credited by the Seller to the Buyer on account of the purchase price of said real property as herein set forth.

2. That the purchase price of said land and building above described shall be the sum of Three Hundred Thirty Five Thousand, Six Hundred Twenty Two (\$335,622) Dollars, which sum shall be paid to the Seller as follows:

(a) The Buyer agrees to assume and pay the balance to become due, not exceeding Fifty Thousand (\$50,000.00) Dollars, on a certain Promissory Note made by the Seller to Bank of America National Trust and Savings Association, dated February 25, 1946, in the principal sum of One Hundred Twenty

Exhibit 5-E—(Continued)

Thousand (\$120,000.00) Dollars, which said Promissory Note is secured by a Deed of Trust of even date with said Promissory Note on said real property made by the Seller to Corporation of America, a corporation, as trustee for Bank of America National Trust and Savings Association, recorded March 9, 1946, in Liber 4426 of Official Records at Page 239, in the office of the County Recorder of the City and County of San Francisco, State of California. The Seller represents and warrants to the Buyer that said Promissory Note is payable to said Bank of America National Trust and Savings Association in installments of One Thousand Five Hundred Fifty-Four and 54/100 (\$1,554.54) Dollars monthly, including interest, and that the balance due on said Promissory Note as of December 31, 1950, was the sum of Forty-Nine Thousand Nine Hundred Forty and 51/100 (\$49,940.51) Dollars. The Seller agrees that the amount due under the terms of said Promissory Note at the time of the exercise of this option shall not exceed the sum of Fifty Thousand (\$50,000.00) Dollars.

(b) The Buyer shall receive credit on account of the purchase price of said real property for all deposits made by the lessees on the leases specified in paragraph 1(c) above set forth, including but not limited to the deposit of Twenty Five Thousand (\$25,000.00) Dollars made under the Morofsky lease, the receipt of which was heretofore acknowledged on May 1, 1950.

(c) Within the time specified for closing, herein-

Exhibit 5-E—(Continued)

after stated, the Buyer shall pay the Seller the following sums, for which the Buyer shall be given credit on the balance of the purchase price:

(i.) A sum of money equal to the difference between the sum of Fifty Thousand (\$50,000.00) Dollars and the amount of money unpaid from the Seller to the Bank of America National Trust and Savings Association at the time of the consummation of the sale on the Promissory Note specified in paragraph 2(a) hereof.

(ii.) The sum of Thirty Nine Thousand (\$39,000.00) Dollars.

(d) The balance of the purchase price, namely, the difference between the purchase price of Three Hundred Thirty Five Thousand Six Hundred Twenty Two (\$335,622.00) Dollars and the various sums of money for which the Buyer shall be given credit thereon, as herein specified, shall be evidenced by a Promissory Note secured by a second Deed of Trust on the real property hereinabove described, which said Deed of Trust shall be junior only to the first Deed of Trust referred to in subdivision (a) of this paragraph 2 of this agreement. Said Promissory Note secured by said second Deed of Trust shall bear interest at the rate of four and one-half ($4\frac{1}{2}\%$) per cent per annum on the principal amount and decreasing balances thereof. The principal amount of said Promissory Note shall be payable to the Seller in installments of Three Thousand Five Hundred (\$3,500.00) Dollars monthly, plus interest, commencing one month after the con-

Exhibit 5-E—(Continued)

summation of said sale for twelve (12) successive months; thereafter, in installments of Five Thousand (\$5,000.00) Dollars monthly, plus interest at the same rate until said Promissory Note shall be fully paid, or until the encumbrances against said real property are refinanced as hereinafter stated.

Said Promissory Note and said second Deed of Trust shall be on a standard form generally used by title insurance companies in the City and County of San Francisco, State of California, and approved in writing by the Seller.

3. This option to purchase shall be exercised by Harry Morofsky, as Buyer, by serving upon the Seller, either personally or by registered United States mail, postage prepaid, a written notice of the Buyer's election to exercise said option to purchase said real property and building. When the option to purchase is exercised, all obligations of the purchaser, as stated herein, and all papers in connection therewith, shall be signed by Herman Hertz, as an individual, or by Hertz Shoe Clinic, Inc., a California corporation, in the place and stead of said Harry Morofsky. The Buyer shall have the option and right to determine whether the title to said real property shall be taken in the name of Herman Hertz or in the name of Hertz Shoe Clinic, Inc.

4. In the event the Buyer exercises the option to purchase herein granted, within the time limit herein provided, the owner (either said Herman Hertz or said Hertz Shoe Clinic, Inc.) shall make, sign, execute, acknowledge and deliver a certain Inden-

Exhibit 5-E—(Continued)

ture of Lease concurrently therewith and as a part of the consummation of said sale and purchase, wherein there shall be leased to the Seller the third floor of the office portion of the building situate on the property hereinabove described for a period of ten (10) years at a rental of Four Hundred (\$400.00) Dollars per month, with an option to the Seller, as the Lessee of said office space, to extend the term of said Lease for an additional ten (10) year period thereafter, upon the same terms, covenants and conditions of said Lease, except that the rental during said extended term shall be subject to arbitration, but in no event less than Four Hundred (\$400.00) Dollars monthly rental and, provided further, that during said extended term the Lessor named in said Lease shall have the right and option to cancel said Lease in case of a desire of the Lessor to demolish said building, or if the building is sold for use for other than office purposes, said option to cancel to be exercisable upon six (6) months previous written notice of cancellation. The said Lease shall become effective on the first day of the month immediately succeeding the month in which the sale of the within described property is consummated, and until said Lease becomes effective, the Seller shall not be liable to the Buyer, except as otherwise provided in this agreement, for the payment of any rent on account of its occupancy of the third floor space heretofore mentioned.

Said Lease shall be in the form annexed hereto marked "Exhibit A" and made a part hereof and

Exhibit 5-E—(Continued)

which has been initialed for identification by the respective parties hereto.

5. Prior to the commencement of any building development on the demised premises and as long as the Seller is the holder of a second deed of trust, the Buyer shall furnish the Seller with plans and specifications showing the proposed improvement and secure the Seller's written assent thereto. It is agreed, however, that anything herein or in said Lease dated October 6, 1949 to the contrary notwithstanding, the Buyer shall immediately hereafter clear that portion of the real property formerly occupied by the Tivoli Theatre, a diagram of which area is annexed hereto and marked Exhibit B and by such reference made a part hereof, and the Buyer may use the said premises and area for parking lot facilities by erecting a ramp for ingress and egress therefrom through the old entrance to the said Tivoli Theatre and such other ramps as the Buyer may deem necessary.

6. The parties shall have sixty (60) days from and after the exercise of the within option by the Buyer to pay all sums and to deliver documents necessary to complete said sale of real property. All sums and documents shall be delivered by the Buyer and the Seller respectively to the California Pacific Title Insurance Company at its office in the City and County of San Francisco, State of California, or other title insurance company to be selected by the Seller, as escrow holder, and said transaction shall be consummated within said time limit.

Exhibit 5-E—(Continued)

Buyer shall pay all costs of title insurance policies and escrow charges and all other charges in connection therewith, except that Seller shall pay for the documentary stamps required to be affixed to the Deed transferring title to the real property hereinabove described from Seller to Buyer. All taxes, insurance and rental shall be pro rated between the parties as of the date of the recordation of the Deed.

7. (a) Ten (10) days from the date of the exercise of the within option by the Buyer are allowed to the said Buyer to examine title to said property and report in writing any valid objection thereto to the Seller at its office at No. 70 Eddy Street, San Francisco, California. If no such written objection to title is so reported, then within sixty (60) days after the exercise of the within option by the Buyer, all sums and documents necessary to complete said sale of real property and lease of office space shall be delivered by the Buyer and the Seller respectively to the escrow holder heretofore named, and said transaction shall be consummated within said time limit.

(b) If any such objection to said title is reported, the Seller shall use all due diligence to remove it within ninety (90) days thereafter, and if so removed, then within five (5) days after said objection has been removed, all sums and documents necessary to complete said sale of real property and lease of office space shall be delivered by the Buyer and the Seller respectively to the escrow holder here-

Exhibit 5-E—(Continued)

tofore named and said transaction shall be consummated within the time limit hereinabove set forth, save and except as extended by the provisions of this sub-paragraph (b).

(c) If such objection cannot be removed within the time allowed, the Buyer's obligation to complete said purchase of real property may, at the election of the Buyer, terminate and end, and this Agreement shall continue in full force and effect to the extent herein elsewhere provided as though the Buyer had not exercised the within option to purchase, unless the Buyer elects to purchase said property upon all of the foregoing terms, covenants and conditions but subject to said defects and objections.

(d) If the Buyer elects to purchase said real property upon all of the foregoing terms, covenants and conditions, but subject to said defects and objections, he shall notify the Seller of said election in writing within said ninety (90) day period allowed to the Seller to remove said objection and within five (5) days after the giving of said notice of election, all sums and documents necessary to complete said sale of real property and lease of office space shall be delivered by the Buyer and the Seller respectively to the escrow holder heretofore named, and said transaction shall be completed within the time limit hereinabove set forth except as extended by the provisions of this sub-paragraph (d).

8. If after the exercise of said option, the Buyer

Exhibit 5-E—(Continued)

shall fail to comply with any of the terms, covenants or conditions at the time or in the manner provided in this Agreement, or in the event that the Buyer does not exercise the within option to purchase within the time limit herein provided, or consummate the sale within the time limit hereinabove set forth, the Seller shall be released from any and all obligation to sell said real property hereunder. The said deposit of Twenty-Five Thousand (\$25,000.00) Dollars referred to hereinabove in paragraph 1 hereof shall be retained by the Seller as additional collateral security to guaranty the Buyer's faithful performance of all of the terms, covenants and conditions of said Lease dated October 6, 1949, and for the payment of any and all sums for which the Buyer may be or become liable hereunder. Seller is hereby granted the irrevocable right, but is not required, to use and pay but at its option all or any part of said security without prior notice to Buyer for the purpose of performing any duties or paying any sums that the Buyer is required to perform or pay under the terms of said Lease and concerning the performance and payment of which the Buyer is in default. To the extent that said security is not used or paid out the Buyer shall receive credit therefor against rent falling due at the end of the term of said Lease. Said security shall bear no interest.

9. Buyer and Seller hereby ratify and confirm all of the covenants, terms and conditions of said Indenture of Lease dated October 6, 1949, except

Exhibit 5-E—(Continued)

insofar as the same may have been modified or altered by any of the terms, covenants and conditions of this Agreement, and notwithstanding each and every of the terms, covenants and conditions herein set forth the Seller hereby expressly reserves and retains the guaranty by Herman Hertz of Lessee's (the Buyer's) performance under the terms of said Lease.

10. Neither this Agreement nor any right, title or interest of the Buyer created hereunder shall be assigned, mortgaged, pledged or hypothecated by the Buyer to any person, firm or corporation except Herman Hertz or Hertz Shoe Clinic, Inc., a California corporation, without the prior written consent of the Seller. The Seller does hereby give its consent to the assignment of this Agreement to said Herman Hertz or said Hertz Shoe Clinic, Inc.

11. If, after said real property and building shall have been purchased pursuant to the provisions hereof, the owner thereof shall desire to refinance the existing encumbrances against said real property, the Seller agrees to permit the same by removing from record the Deed of Trust mentioned in paragraph 2(a) of this Agreement and by cancelling the Promissory Note for which said Deed of Trust is the security, and by accepting from such owner contemporaneously another Promissory Note (as hereinafter set forth) executed by the owner to the Seller secured by another Deed of Trust which shall be junior only to a first Deed of Trust here-

Exhibit 5-E—(Continued)

after to be executed by the owner, subject to the following conditions:

(a) That the Deed of Trust constituting the first encumbrance against said real property shall not be in a sum greater than Three Hundred Twenty-Five Thousand (\$325,000.00) Dollars, without the consent of the Seller.

(b) That the moneys realized from such refinancing shall be used by the owner

(i.) First, to pay in full any moneys remaining due on the Promissory Note secured by the Deed of Trust specified in paragraph 2(a) hereof;

(ii.) Second, to reduce the amount of the secured obligation of the owner to the Seller as specified in paragraph 2(e) and the introduction to this paragraph 11 hereof to the sum of One Hundred Twenty-Five Thousand (\$125,000.00) Dollars;

(iii.) Third, to further reduce the obligation of the owner to the Seller in an amount of money which the owner would have been required to pay the Seller, had the total obligation of the owner to the Seller been One Hundred Twenty-Five Thousand (\$125,000.00) Dollars on October 1, 1951, and which would have been reduced thereafter at the rate of One Thousand Two Hundred Fifty (\$1,250.00) Dollars monthly; that is to say, the owner shall pay the Seller in further reduction of said obligation, at the time of refinancing, One Thousand Two Hundred Fifty (\$1,250.00) Dollars for each month which has elapsed after October 1, 1951 to the date of refinancing.

Exhibit 5-E—(Continued)

(iv.) Fourth, to finance the erection of a structure on said real property.

(v.) Fifth, to apply any excess sums remaining after the moneys obtained from refinancing have been fully paid as set forth in sub-paragraphs i, ii, iii and iv hereof, to further reduce the obligation of the owner to the Seller, which said excess shall be paid to the Seller as indicated, in further reduction of the Premissory Note specified in paragraph 11(e) hereof.

(c) Upon refinancing and prior to the commencement of any building development on the real property, the owner shall furnish the Seller with plans and specifications showing the proposed improvements to be made, and secure the Seller's written assent thereto, and such improvements shall be commenced by the owner within six (6) months from the date of such refinancing. The Buyer shall submit said plans and specifications to the Seller for approval within 90 days after the completion of such refinancing; the Seller shall have 30 days thereafter to approve or disapprove, in writing, said plans and specifications. If the Seller does not approve the same within the time specified, the plans and specifications shall be deemed to have been approved by the Seller. If the same are disapproved by the Seller, within said time, the Buyer shall have sixty (60) days after such disapproval within which to submit revised plans and specifications and within which to commence the proposed improvements,

Exhibit 5-E—(Continued)

which said revised plans and specifications shall likewise be subject to the written approval or disapproval by the Seller within thirty (30) days thereafter. After refinancing and disbursements of funds as provided from said refinancing in this paragraph and if construction of the proposed improvements be not commenced within the six month time limit set forth herein, then all funds in the escrow shall be paid to the seller for application to a pro tanto reduction in the obligation of the owner under the aforementioned second deed of trust.

(d) Any moneys realized by refinancing shall be escrowed in writing, either with the financial institution or person lending the money for such refinancing, or with an escrow company to be selected by the Seller, and all disbursements made therefrom shall be used to pay the obligations, or to defray the costs and expenses enumerated in subparagraphs i, ii, iii, iv and v of this paragraph 11 of this Agreement, in the order set forth, and all disbursements from said escrow shall be subject to the written approval of the Seller.

(e) Upon such refinancing, as herein set forth, the balance of the obligation of the owner to the Seller shall be evidenced by a Promissory Note of the owner to the Seller secured by a second Deed of Trust on the real property hereinabove described, which said Deed of Trust shall be junior only to the Deed of Trust constituting the first encumbrance thereon. Said Promissory Note and said second Deed of Trust shall be on a standard form generally

Exhibit 5-E—(Continued)

used by title insurance company in the City and County of San Francisco, State of California, and approved in writing by the Seller said Promissory Note shall be payable by the owner to the Seller in monthly installments of One Thousand Two Hundred Fifty (\$1,250.00) Dollars, or more, plus interest at the rate of four and one-half (4½%) per cent per annum, until the obligation of the owner to the Seller is fully paid.

12. The time for the exercise of said option and for the performance of any and all acts and duties on the part of the Buyer and the Seller to be performed under the terms hereof shall be of the essence of this Agreement.

In Witness Whereof, we have hereunto set our hands and seals the date and year first above written.

Blumenfeld Enterprises, Inc.,
a corporation,

/s/ By Joseph Blumenfeld, President,

/s/ By A. Blumenfeld, Secretary,
Seller

/s/ Harry Morofsky, Buyer

The above Agreement shall not constitute my guaranty of that certain Lease dated October 6, 1949, mentioned in said Agreement. I further agree to execute the documents specified in the foregoing instrument and when said option to purchase is exercised.

/s/ Herman Hertz

Exhibit 5-E—(Continued)

EXHIBIT A

INDENTURE OF LEASE

This Lease made this....day of....., 1951, between.....and Joseph Blumenfeld, hereinafter called respectively Lessor and Lessee, without regard to number or gender,

Witnesseth:

That Lessor hereby leases unto Lessee, and Lessee hereby hires from Lessor, those certain premises known as the Third Floor of that certain building commonly known and designated as No. 70 Eddy Street, in the City and County of San Francisco, State of California.

Said premises shall be used as offices for no other business or purpose without the written consent of Lessor.

The term shall be for ten (10) years commencing on the....day of....., 19.., at the monthly rental of Four hundred (\$400.00) Dollars, payable in advance on the first day of each and every month. The Lessor hereby gives and grants to the Lessee the privilege of renewing this Lease upon the same terms, covenants and conditions as herein expressed for an extended period of ten (10) years from and after the expiration of the original term hereof, except that during the extended term the rental shall be subject to arbitration, but in no event less than Four Hundred (\$400.00) Dollars

Exhibit 5-E—(Continued)

used by title insurance companies in the City and County of San Francisco, State of California, and approved in writing by the Seller. Said Promissory Note shall be payable by the owner to the Seller in monthly installments of One Thousand Two Hundred Fifty (\$1,250.00) Dollars, or more, plus interest at the rate of four and one-half (4½%) per cent per annum, until the obligation of the owner to the Seller is fully paid.

12. The time for the exercise of said option and for the performance of any and all acts and duties on the part of the Buyer and the Seller to be performed under the terms hereof shall be of the essence of this Agreement.

In Witness Whereof, we have hereunto set our hands and seals the date and place first above written.

Blumenfeld Enterprises, Inc.,
a corporation,

/s/ By Joseph Blumenfeld, President,

/s/ By A. Blumenfeld, Secretary,
Seller

/s/ Harry Morofsky, Buyer

The above Agreement shall not alter my guaranty of that certain Lease dated October 6, 1949, mentioned in said Agreement. I further agree to execute the documents specified in the foregoing instrument if and when said option to purchase is exercised.

/s/ Herman Hertz

Exhibit 5-E—(Continued)

EXHIBIT A

INDENTURE OF LEASE

This Lease made this....day of....., 1951, between.....and Joseph Blumenfeld, hereinafter called respectively Lessor and Lessee, without regard to number or gender,

Witnesseth:

That Lessor hereby leases unto Lessee, and Lessee hereby hires from Lessor, those certain premises known as the Third Floor of that certain building commonly known and designated as No. 70 Eddy Street, in the City and County of San Francisco, State of California.

Said premises shall be used as offices for no other business or purpose without the written consent of Lessor.

The term shall be for ten (10) years commencing on the....day of....., 19.., at the monthly rental of Four Hundred (\$400.00) Dollars, payable in advance on the first day of each and every month. The Lessor hereby gives and grants to the Lessee the privilege of renewing this Lease upon the same terms, covenants and conditions as herein expressed for an extended period of ten (10) years from and after the expiration of the original term hereof, except that during the extended term the rental shall be subject to arbitration, but in no event less than Four Hundred (\$400.00) Dollars

Exhibit 5-E—(Continued)

monthly, and that during said extended period the Lessor shall have the option and right to cancel said Lease in case of demolition of the building or if the same is sold for use for other than its present purposes, by giving the Lessee at least six (6) months previous written notice of its intention to cancel said Lease. The option to extend the original term as specified above shall be exercised by the Lessee by giving the Lessor at least six (6) months written notice thereof prior to the end of the original term.

It is further mutually agreed between the parties as follows:

1. Lessee shall not use or permit said premises or any part thereof to be used for any purpose or purposes other than the purpose or purposes for which said premises are hereby leased; and no use shall be made or permitted to be made of the said premises nor acts done which will increase the existing rate of insurance upon the building in which said premises are located, or cause a cancellation of any insurance policy covering said building or any part thereof, nor shall Lessee sell or permit to be kept, used or sold in or about said premises any article which may be prohibited by the standard form of fire insurance policies.

2. Lessee shall not commit or suffer to be committed any waste upon said premises nor any public or private nuisance or other act or thing which may disturb the quiet enjoyment of any other tenant

Exhibit 5-E—(Continued)

in the building in which the demised premises are located, nor without limiting the generality of the foregoing, shall Lessee allow said premises to be used for any improper, immoral, unlawful or objectionable purpose, nor for the keeping, storing or selling of intoxicating liquors, nor for any kind of eating house or for sleeping purposes, nor for washing clothes or cooking therein, and nothing shall be prepared, manufactured or mixed in said premises which might emit an odor in the corridors of said building, nor shall Lessee use any apparatus, machinery or device in or about the demised premises which shall make any unreasonable noise or set up any vibration or which shall in any way unreasonably increase the amount of electricity, or water agreed to be furnished or supplied under this Lease.

3. Lessee shall, at his sole cost and expense, comply only with such requirements of all Municipal, State and Federal authorities now in force as shall pertain exclusively to the Third Floor of the building hereinbefore referred to, but in this respect it is mutually understood and agreed that the Lessee shall not be required, at his expense, to comply with the requirements of any Municipal, State or Federal authorities now or hereafter in force relating to the said premises insofar as the said leased premises are an integral part of the building in which the said leased premises are located, and in this respect it is agreed that the Lessor shall, at his sole cost and expense, comply with all requirements of all Municipal, State and Federal authorities now or

Exhibit 5-E—(Continued)

hereafter in force relating to the building of which the leased premises are a part, including the premises themselves, and the Lessor agrees faithfully to provide to the Lessee all facilities and utilities in compliance with all requirements of Municipal, State and Federal authorities now or hereafter in full force and effect.

4. Lessee agrees that the premises are now in tenantable and good condition, and the Lessee further agrees that he will take care of the interior of the premises leased hereunder, provided, however, that the Lessor agrees that he will take care of and maintain the walls, fire escapes, the roof and the structural members of the building in which the leased premises are located insofar as the said walls, fire escapes, roof and structural members relate to and are essential to the use and occupancy of the leased premises by the Lessee, it being further understood that the Lessee waives all rights to make repairs at the Lessor's expense under the provisions of Section 1942 of the Civil Code of the State of California, but said Lessee reserves the right to alter and/or re-arrange the interior partition and walls of the leased premises from time to time at his sole expense in order that they may be conformed to Lessee's requirements for the use of the leased premises as they may vary from time to time.

5. Lessee agrees that at the termination of this Lease or the extended term thereof, Lessee shall surrender said premises to the Lessor in as good

Exhibit 5-E—(Continued)

condition and repair as reasonable and proper use thereof will permit.

6. Lessee as a material part of the consideration to be rendered to Lessor under this Lease hereby waives all claims against Lessor for damages to goods, wares and merchandise in, upon or about said premises and for injuries to persons in or upon or about said premises from any cause arising at any time, except for the negligence of Lessor or his failure to comply with any of the terms, covenants and conditions of this Lease, provided, however, that this waiver and agreement on the part of the Lessee shall relate only to the use and occupancy of the leased premises hereinbefore referred to.

7. Lessee shall permit Lessor and his agents to enter in and upon said premises at all reasonable times for the purpose of inspecting the same and for the purpose of maintaining the building in which the premises are situated and for the purpose of making repairs, alterations and additions to any other portions of the building, as the Lessor may desire.

8. Lessor agrees to furnish the demised premises with water, heat, electricity, automatic elevator service, including elevator maintenance service, janitorial service for the entrance to the building and the glass doors of the entrance. Lessor, however, shall not be liable for failure to furnish any of the foregoing when such failure is caused by con-

Exhibit 5-E—(Continued)

ditions beyond the control of Lessor, or by accidents, repairs or strikes.

9. In the event of a partial destruction of said premises during said term or the extended term thereof, from any cause, Lessor shall forthwith repair the same, provided that such repairs can be made within ninety (90) working days under the laws and regulations of State, County, Federal or Municipal authorities, but such partial destruction shall in no wise annul or void this Lease, except that Lessee shall be entitled to a proportionate reduction of rent while such repairs are being made; such proportionate reduction to be based upon the extent to which the making of such repairs shall interfere with the business carried on by Lessee in said premises. If such repairs cannot be made within ninety (90) working days, or such repairs cannot be made under said laws and regulations, this Lease may be terminated at the option of either party.

10. Lessee shall not assign nor mortgage this Lease or any right hereunder nor sublet the premises nor any part thereof without the prior written consent of the Lessor. No consent to any assignment of this Lease nor any subletting of said premises shall constitute a waiver or discharge of the provisions of this paragraph except as to the specific instance covered thereby; nor shall this Lease nor any interest therein be assignable by operation of law, including bankruptcy, whether voluntary or involuntary, or any other State or Federal law relat-

Exhibit 5-E—(Continued)

ing to debtors, and no trustee, sheriff, creditor, or purchaser to any judicial sale or any officer of any Court or receiver shall acquire any right under this Lease or to the possession or use of the premises or any part thereof without the prior written consent of Lessor. Lessor does hereby give its written consent to the assignment of this Lease to Abe Blumenfeld and/or Blumenfeld Enterprises, Inc. or to any corporation under the operation and/or control of Joseph Blumenfeld and/or Abe Blumenfeld, provided, however, that such corporation will actually occupy the demised premises for corporate purposes.

11. In the event of any breach of this Lease by Lessee, then Lessor, besides other rights or remedies he may have, shall have the immediate right of re-entry and may remove all persons and property from the premises. Should Lessor elect to re-enter as herein provided or should he take possession pursuant to legal proceedings or pursuant to any notice provided by law, he may either terminate this Lease or may, from time to time, without terminating this Lease, relet said premises or any part thereof for such term or terms and at such rental or rentals and upon such other terms and conditions as Lessor, in his sole discretion, may deem advisable, with the right to make alterations or repairs to said premises. Rentals received by Lessor from such reletting shall be applied, first, to the payment of any indebtedness other than rent due hereunder from

Exhibit 5-E—(Continued)

Lessee to Lessor; second, to the payment of rent due and unpaid hereunder; and third, to the payment of any cost of such reletting, and the residue, if any, shall be held by Lessor and applied in the payment of future rent as the same may become due and payable hereunder. Should such rentals received from such reletting during any month be less than agreed to be paid during that month by Lessee hereunder and there be no balance due Lessee hereunder on account of moneys held by Lessor for the payment of future rent, then the Lessee shall pay such deficiency to the Lessor. Such deficiency shall be calculated and paid monthly. No such re-entry or taking possession of said premises by Lessor shall be construed as an election on his part to terminate this Lease unless a written notice of such intention be given to Lessee, or unless the termination thereof be decreed by a Court of competent jurisdiction.

12. The voluntary or other surrender of this Lease by Lessee or mutual cancellation thereof shall not work a merger and shall, at the option of Lessor, terminate all or existing sub-leases or sub-tenancies, or may, at the option of Lessor, operate as an assignment to him of all or any of such sub-leases or sub-tenancies.

13. In case of suit by Lessee or Lessor against the other because of the breach of covenant, term or condition in this Lease contained, on the part of Lessee or Lessor to be kept or performed, the pre-

Exhibit 5-E—(Continued)

vailing party shall be paid by the other a reasonable attorney's fee which shall be fixed by the Court.

14. Any notice required or desired to be served by Lessor upon Lessee shall be deemed to have been sufficiently served if the same shall have been left with the Lessee personally at the demised premises or shall have been deposited in the United States Post Office, postage prepaid, registered, and addressed to Lessee at the demised premises, or such other address as the Lessee may, from time to time, designate in writing.

15. The waiver by Lessor or Lessee of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The acceptance or payment of rent hereunder shall not be construed to be a waiver of any breach by Lessee or Lessor of any term, covenant or condition of this Lease.

16. If said Lessee holds possession of the said premises after the term of this Lease or the extended term hereof, such Lessee shall become a tenant from month to month upon the terms herein specified and at a monthly rental of Four Hundred (\$400.00) Dollars, payable on the first day of each and every month in advance, and shall continue to be such tenant until such tenancy shall be terminated by Lessor or Lessee by the one giving to the

Exhibit 5-E—(Continued)

other a written notice at least one (1) month prior to the date of termination of such monthly tenancy of his intention to terminate such tenancy.

17. It is understood and agreed that the remedies herein given to Lessor and Lessee shall be cumulative, and the exercise of any one remedy by Lessor or Lessee shall not be to the exclusion of any other remedy.

18. The covenants and conditions herein contained shall apply to and bind the heirs, successors, executors, administrators and assigns of all the parties hereto.

19. Time is of the essence of this Lease.

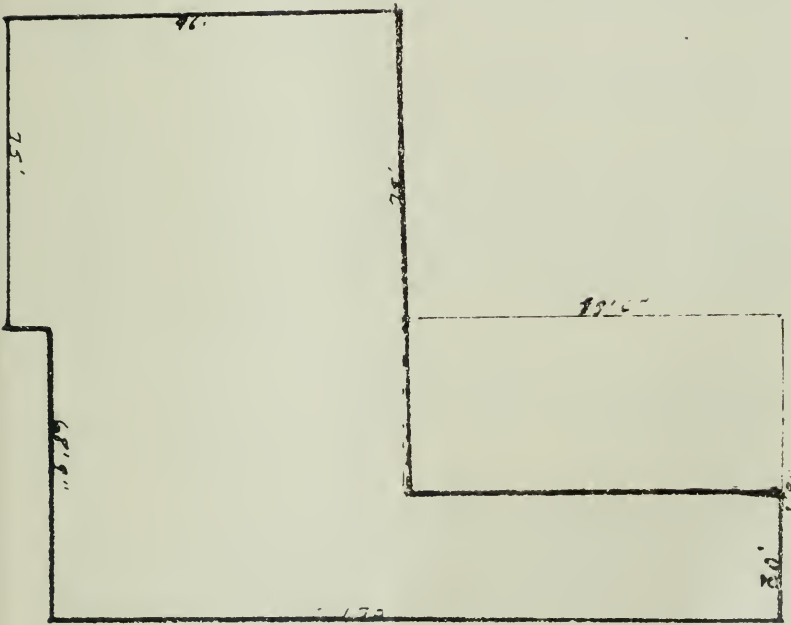
In Witness Whereof, Lessor and Lessee have executed these presents, in duplicate, the day and year first above written.

....., Lessor
/s/ Joseph Blumenfeld, Lessee

[Endorsed]: T.C.U.S. Filed March 16, 1954.

EXHIBIT "B"

ANNA LAKE



EODY STREET

MASON STREET

AP



[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the amended petition filed by the above-named petitioner admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition, but denies that the returns were duly filed.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Denies the allegations contained in paragraph 3 of the amended petition and alleges that the only amount in controversy is the deficiency in income tax of \$31,710.06.

4. Denies the allegations of error contained in subparagraphs 1 to 4, inclusive, of paragraph 4 of the amended petition.

5-(1). Admits that shortly before May 1, 1950 petitioner granted the lessee authority to demolish the building and that on or about May 1, 1950 the lessee caused the said building to be demolished; denies the remaining allegations contained in subparagraph (1) of paragraph 5 of the amended petition.

5-(2). Admits that the petitioner and the Com-

missioner are in agreement as to the rates of depreciation and as to the allocation of the improvements to said property; denies the remaining allegations contained in subparagraph 2 of paragraph 5 of the amended petition.

5-(3). Admits that an application for tentative carry-back adjustment and a claim for refund were filed claiming said refund of \$30,803.55 for said year; denies the remaining allegations contained in subparagraph 3 of paragraph 5 of the amended petition.

6. Denies generally and specifically each and every allegation in the amended petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ DANIEL A. TAYLOR,

Chief Counsel, Internal Revenue
Service

Of Counsel:

Melvin L. Sears, Regional Counsel;

T. M. Mather, Asst. Regional Counsel

L. A. Marcussen, Special Attorney, Internal
Revenue Service

[Endorsed]: T.C.U.S. Filed March 25, 1954.

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

Taxpayer, owner of an old theatre building which could no longer be profitably operated, entered into an agreement on October 6, 1949, for a 25-year lease to begin May 1, 1950, it being contemplated that the lessee would remodel the building for use as a multi-story parking garage. Conditions subsequently imposed by city and county authorities made the conversion economically impossible. Thereafter, on April 24, 1950, petitioner executed an agreement with the lessee looking towards the sale of the property to the lessee at a later time and providing for an option therefor; the agreement also authorized the lessee meanwhile to demolish the building, so that the space might be used for surface parking. The lessor expressly reserved all rights under the original agreement of October 6, 1949. On or about May 1, 1950, at the commencement of the lease, the lessee demolished the building. Subsequently, the lessee exercised the option to purchase the property. At the time of demolition the building had a remaining useful life of less than sixteen years. Held, taxpayer did not sustain a deductible loss by reason of the demolition of the building.

Samuel Taylor, Esq., Walter G. Schwartz, Esq., and Robert Folkoff, C.P.A., for the petitioner.

Leonard A. Marcussen, Esq., for the respondent.

The respondent determined a deficiency in the amount of \$31,710.06 in the income tax of petitioner

for its fiscal year ending July 31, 1948. However, the sole question for decision relates to a deduction for an alleged loss sustained during the fiscal year ending July 31, 1950, which is pertinent here only as a result of the carry-back provisions of the law. The reduction is sought by reason of the demolition of a building by petitioner's lessee pursuant to an agreement between them.

Findings of Fact

Some of the facts have been stipulated. The stipulation and the exhibits attached thereto are incorporated herein by this reference.

Petitioner is a California corporation with its principal office in San Francisco. It filed its corporation income tax returns for its fiscal years ended July 31, 1948, 1949 and 1950 with the collector of internal revenue for the first district of California. It keeps its books and files its returns on the accrual basis.

Petitioner owns and operates theatres and other businesses. On or about March 10, 1946, petitioner purchased the fee interest in the so-called Tivoli property in San Francisco, which consisted of two adjacent, but separate, buildings. One of the buildings was known as the Tivoli Theatre Building, and the other as the Tivoli Office Building. The Theatre Building was constructed in 1911. It had once been an opera house and a famous theatrical landmark in San Francisco. When petitioner acquired the property in 1946 that building had a remaining useful life of twenty years. During the period from Feb-

ruary 10, 1946 to March 2, 1946, the Theatre Building was used for legitimate stage performances. From March 30, 1946 to June 2, 1947, it was used for the presentation of motion pictures. By 1947, the district in which the theatre was located was no longer a desirable theatrical district; there were many bars in the area, and it had become a "tenderloin" district. Its location was away from the main theatre and entertainment districts. From June 2, 1947 until October 6, 1949, the theatre was closed except for one three-day period in 1948 when it was rented for an outside theatrical showing. Petitioner had closed the theatre in 1947 because it was losing money on the operation and found it economically impractical to keep it running. Petitioner thereafter had no intention of using the property as a theatre again.

The Tivoli Office Building from the date of its acquisition by petitioner has been used as an office building, and a portion of the ground floor has been occupied by a cocktail lounge and bar.

Shortly prior to October 6, 1949, petitioner had negotiations with representatives of a prospective lessee of the Theatre Building, looking towards the conversion of the building for garage and parking purposes. As a result of these negotiations, petitioner, on October 6, 1949, as lessor, and Harry Morofsky, as lessee, executed a lease of the Theatre Building for a term of twenty-five years and an aggregate rental of \$420,000; in addition, the lessee agreed to pay all real estate taxes and charges levied against the property. Although the term of the

lease was to start May 1, 1950, the lessee was allowed to enter immediately for the purpose of beginning the necessary alterations. The specified rental was to be paid at the rate of \$1,250 per month for the first ten years, and \$1,500 per month for the last fifteen years. The lease specifically limited the use of the property for the purpose of conducting the following business:

A garage and storage and offices for the use of the Lessee in connection with garage operations, or concessions under-let hereunder to be used with office space, as hereinafter provided.

In the lease Morofsky, the lessee, specifically undertook to remodel the building so as to make it suitable for conducting a garage and car storage business with such offices as might be necessary for the conduct of the business. For this purpose petitioner, as lessor, granted the lessee authority to construct as many floors as the lessee might find necessary but the lessee was obligated as a minimum to construct a basement floor and a first and second floor above that.

Under the lease the lessee was required to submit to petitioner for its approval plans for the remodeling of the building. In the latter part of 1949, preliminary and final plans for a five-story garage were prepared by the lessee at an expense of approximately \$4,000, and were approved by petitioner. It was anticipated by the lessee that the cost of the remodeling would be between \$45,000 and \$50,000.

At the time the lease was entered into on October

6, 1949, neither the petitioner nor the lessee had any intention of demolishing the Theatre Building.

In November 1949, the lessee submitted to the proper authorities of the City and County of San Francisco his plans for remodeling the Tivoli Theatre Building so as to convert the building to a five-story parking garage. The city and county authorities declined to approve the plans as submitted and insisted upon costly revisions involving a substantial increase in the thickness of the walls by the addition of concrete, the inclusion of additional supporting members, and changes in the plans for the ramps, all of such a nature as to reduce substantially the amount and convenient usability of floor space for parking purposes and to render it economically unfeasible to use the Theatre Building for the purpose of a parking garage.

The estimated cost of the remodeling, if performed in accordance with the plans required by the City and County of San Francisco, was in excess of \$125,000. It was not economically feasible to incur such cost, and the plan for remodeling the Theatre Building for purposes of a parking and storage garage therefore had to be abandoned.

After the defeat of plan for remodeling the building, the lessee consulted another engineer who advised that the Theatre Building be demolished and that the area thus released be used for surface parking.

On April 24, 1950, the lessor and lessee entered into a letter agreement looking towards the purchase of the entire Tivoli property by the lessee, and

providing in any event for permission to the lessee to demolish the Theatre Building. That agreement reads in part as follows:

1. The sale price is to be \$350,000.00.

2. The sum of \$25,000.00 is to accompany the sale agreement, in consideration for which the Purchaser shall have an option to conclude the deal within one (1) year.

* * * * *

5. In the event the Purchaser does not conclude the purchase of the property within one (1) year, the \$25,000.00 mentioned under No. 2 above shall remain with the Seller as additional lease deposit under that certain lease dated the 6th day of October, 1949, between Blumenfeld Enterprises, Inc., as lessors, and Harry Morofsky, as lessee, and shall be deducted from rentals at the end of the lease term. In consideration of this additional lease deposit, the lessors grant to the lessee permission to demolish the rear portion of the premises [Theatre Building] for the purposes conforming to said lease and further provided the lessee shall furnish to the lessor modified plans showing the proposed basement and ground floor development and shall secure from the lessors written permission for said development. All of the cost of demolishing and improving shall be at the lessee's sole cost and expense.

6. The Seller, as the lessor, expressly retains all of their rights under the aforementioned lease dated October 6, 1949, and makes no waiver of any of the conditions of said lease. * * *

7. In the event the Purchaser exercises his option

to purchase within the one (1) year period, then he shall be given credit by the Seller for the net gross profit from the operation of all of the premises in the interim period. The Seller shall deduct from said rentals, taxes, insurance, utility costs and all other legitimate items of expense.

The letter agreement also contained a statement that it sets forth only the "basic agreement" and that both parties would thereafter execute a "formal sales agreement". The \$25,000 payment, referred to in paragraph "2" above, was in fact made on May 1, 1950. When the letter agreement of April 24, 1950, was entered into, the lessee had not determined whether he would exercise the option to purchase which was given therein.

The "formal" agreement contemplated by the parties was executed on February 23, 1951. By its terms the time for exercise of the lessee's option was extended to expire on October 1, 1951, and the lessee was expressly required, notwithstanding anything in the lease of October 6, 1949, to the contrary, to clear the portion of the property formerly occupied by the theatre. The lessee was also expressly authorized to use the "premises and area for parking lot purposes by erecting a ramp for ingress and egress therefrom through the old entrance to the Tivoli Theatre." Pursuant to permission granted by the lessor in paragraph "5" of the letter agreement of April 24, 1950, the lessee had already demolished the Theatre Building on or about May 1, 1950, prior to the end of petitioner's fiscal year ended July 31, 1950.

There was at no time any understanding or plan, either by the petitioner or the lessee, to construct a new building on the theatre property, and no building has ever been constructed thereon.

On September 27, 1951, Harry Morofsky exercised the option granted by the agreements of April 24, 1950 and February 23, 1951, to purchase the Tivoli property, and on November 7, 1951, assigned his rights thereunder to the Hertz Shoe Clinic, Inc., a corporation. That corporation is now the owner of the Tivoli property.

Petitioner has claimed in its returns, and respondent has allowed, depreciation on the Tivoli Theatre and Office Buildings on the basis of a remaining life of twenty years from the date of its acquisition of the fee interest therein (March 10, 1946).

In its income tax return for its fiscal year ended July 31, 1950, petitioner claimed as a deduction an abandonment loss on the demolition of the Tivoli Theatre Building in the amount of \$154,226.34¹ representing the undepreciated balance of the cost of that building, as shown on petitioner's books, resulting in a net operating loss of \$82,818.32 for its fiscal year ended July 31, 1950. Petitioner claimed a net operating loss carry-back of \$82,818.32 from its fiscal year ended July 31, 1950, to its fiscal year ended July 31, 1948, and made application for a

¹ This amount was excessive in any event, since it is stipulated that the total unrecovered cost of the Theatre Building and improvements was \$132,284.42.

tentative carry-back adjustment under Section 3780 of the Internal Revenue Code of 1939. A tentative allowance was made to petitioner under this section in the amount of \$30,803.55.

In his determination of petitioner's deficiency for the fiscal year ended July 31, 1950, respondent has disallowed the deduction claimed upon the demolition of the Tivoli Theatre Building, and in his notice of deficiency to petitioner for its fiscal year ended July 31, 1948, respondent has not allowed the net operating loss deduction claimed by petitioner.

Respondent on or about June 27, 1952, mailed to petitioner by registered mail the notice of deficiency covering its fiscal years ended July 31, 1949 and 1950. Petitioner did not file a petition with this Court for a redetermination of the deficiencies set forth in the notice. Petitioner paid the deficiencies and filed claims for refund.

Opinion

Raum, Judge: The sole question for decision is whether the demolition of the Tivoli theatre building on or about May 1, 1950 resulted in a deductible loss to petitioner. There is no serious dispute between the parties as to the underlying facts.

Petitioner acquired the fee interest in the property in March 1946. The building then had a remaining useful life of twenty years. After an attempt to use the building for the presentation first of legitimate performances and then of motion pictures, petitioner found that it was losing money.

The district in which the property was located had deteriorated, and petitioner in 1947 closed the theatre without any intention of reopening it thereafter. On October 6, 1949, petitioner entered into an agreement in which it undertook to lease the property for a twenty-five year term beginning May 1, 1950 at an aggregate rental of \$420,000, payable in specified monthly installments; in addition, the lessee was to pay real estate taxes and other charges levied against the property. The lease agreement contemplated that the lessee would remodel the building for use as a multi-story parking garage. However, the plans for conversion of the building were thereafter found unacceptable by the city and county authorities which insisted upon modifications that were so costly as to require that the entire project be abandoned. The lessee was then advised by an engineer that the building be demolished and the space thus released be used for surface parking.

Such was the unhappy situation in which the lessee found himself in April 1950, prior to commencement of the term of the lease, and it was in the light of that situation that the petitioner and the lessee executed the letter agreement of April 24, 1950. That agreement provided for an option, upon payment of \$25,000, to purchase the entire Tivoli property for \$350,000, the option to be exercised within a specified time. The agreement also authorized the lessee, upon payment of the \$25,000 (which could be applied against the lessee's obligation for rent in the event that the option were not exercised) to demolish the theatre building. Peti-

tioner expressly retained all rights under the lease agreement of October 6, 1949.

It was pursuant to permission thus granted in the letter agreement of April 24, 1950, that the lessee, on or about May 1, 1950 (at the beginning of the term of his twenty-five year lease) demolished the building. Thereafter, he exercised the option to purchase the property. We hold that, in the circumstances of this case, petitioner did not suffer any loss by reason of demolition of the building.

It is of course true that the destruction of a building may result in a deductible loss (cf. *Parma Co.*, 18 B.T.A. 429; *Dayton Co. vs. Commissioner*, 90 F.2d 767 (C.A. 8)), and Treasury regulations have long recognized that such deduction may be available. Petitioner relies upon such regulations.² How-

² Regulations 111, Section 29.23(e)-2:

Voluntary Removal of Buildings.—Loss due to the voluntary removal or demolition of old Buildings, the scrapping of old machinery, equipment, etc., incident to renewals and replacements is deductible from gross income. When a taxpayer buys real estate upon which is located a building, which he proceeds to raze with a view to erecting thereon another building, it will be considered that the taxpayer has sustained no deductible loss by reason of the demolition of the old building, and no deductible expense on account of the cost of such removal, the value of the real estate, exclusive of old improvements, being presumably equal to the purchase price of the land and building plus the cost of removing the useless building.

The first sentence, upon which petitioner relies, is not literally applicable here, because the demolition was not "incident to renewals and replacements".

ever, it has been firmly established that not every destruction of a building results in a deduction, since none is available where the taxpayer has not in fact sustained a loss by reason of the demolition. An example is furnished in the regulations, where one purchases real estate intending to raze an existing structure for the purpose of erecting another building on the site. In such circumstances the purchaser is not regarded as having in fact sustained any loss, and no deduction is allowable. But the situation thus described is not the only one in which the deduction is unavailable. See *Commissioner vs. Appleby's Estate*, 123 F.2d 700, 702 (C.A. 2). And it has been disallowed in a variety of other circumstances, where no actual loss was suffered as a result of the demolition. *Charles N. Manning*, 7 B.T.A. 286; *William Ward*, 7 B.T.A. 1107; *Oscar K. Eysenbach*, 10 B.T.A. 716; *Anahma Realty Corp.*, 16 B.T.A. 749, affirmed, 42 F.2d 128 (C.A. 2), certiorari denied, 282 U.S. 854; *Mary C. Young*, 20 B.T.A. 692, affirmed, 59 F.2d 691 (C.A. 9), certiorari denied, 287 U.S. 652; *Spinks Realty Co.*, 21 B.T.A. 674, affirmed, 62 F.2d 860 (App. D.C.); *Laurene Walker Berger*, 7 T.C. 1339.

We turn then to the facts of this case to inquire whether petitioner in fact sustained a loss by reason of the demolition. It must be kept in mind that when petitioner purchased the property in March 1946, the building had a remaining useful life of twenty years. By May 1, 1950, when the building was demolished, less than sixteen years of useful life remained. Yet, at that time, when the building and

improvements had an unrecovered cost of \$132,284.42, the property was subject to a twenty-five year lease at an aggregate rental of \$420,000. And in the agreement of April 24, 1950, authorizing the lessee to demolish the building, petitioner expressly retained all its rights as lessor. The term of the lease extended substantially beyond the remaining useful life of the building, and since the lessee's obligations under the lease were in no way curtailed upon removal of the building, we cannot conclude that petitioner in fact sustained any loss by reason of the demolition. Cf. *Albert L. Rowan*, 22 T.C. . . . (No. 105).

Moreover, there are other factors in this case that preclude the allowance of the claimed deduction. Permission to demolish the theatre building was given to the lessee in the letter agreement of April 24, 1950. That agreement was one that looked primarily towards the sale of the property. Of course, there was no assurance at that time that the sale would go through, but the option was in fact exercised and the sale did in fact take place, as contemplated, although there were modifications in some of the details. In such circumstances the only loss allowable would be one at the time of sale equal to the excess, if any, of the adjusted basis over the sales price. See *Oscar K. Eysenbach*, 10 B.T.A. 716, 722.

Finally, the deduction must be disallowed for the further reason that the removal of a building in connection with obtaining a lease on the property is regarded as part of the cost of obtaining the lease.

Charles N. Manning, *supra*; Mary C. Young, *supra*; Spinks Realty Co., *supra*; Laurene Walker Berger, *supra*. To be sure, the demolition of the theatre building was not contemplated at the time of execution of the agreement of October 6, 1949, but, prior to the commencement of the lease (May 1, 1950), it had become abundantly clear that the entire purpose of the lease would be defeated unless the building were demolished. And it was in recognition of this plain fact that the permission to remove the building was granted on April 24, 1950. The provision granting that permission was a modification of the original agreement, and the lease must be regarded as founded on both the October 6, 1949 and April 24, 1950 agreements. Indeed, the razing of the building may well have constituted a benefit rather than a detriment to petitioner. The evidence suggests that the building was obsolete or obsolescent, and the rather substantial cost of demolition was borne by the lessee. Here then was a situation where such a building was removed at the expense of the lessee who was about to begin a long-term lease under terms and conditions that appear to have been highly favorable to the lessor. From the lessor's point of view the building was being replaced by an advantageous lease and therefore no deductible loss is allowable in accordance with the holdings in the cited cases that the unrecovered cost of the razed building is to be treated as part of the cost of the lease.

The facts in this case are unusual, but from whatever point of view the problem is studied, we are

led inevitably to the conclusion that petitioner did not in fact sustain a loss as a result of the destruction of the theatre building, and that to allow the claimed deduction here would be to give petitioner a windfall that Congress never intended.

Decision will be entered under Rule 50.

[Endorsed]: T.C.U.S. Filed January 20, 1955.

The Tax Court of the United States
Washington

Docket No. 39132

BLUMENFELD ENTERPRISES, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the findings of fact and opinion filed herein January 20, 1955, directing that decision be entered under Rule 50, the parties, on March 11, 1955, filed an agreed computation for entry of decision. It is therefore

Ordered and Decided: That there is a deficiency in income tax for the fiscal year ended July 31, 1948, in the amount of \$31,405.31.

[Seal] /s/ ARNOLD RAUM,
Judge

Entered: March 23, 1955.

Served: March 24, 1955.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 39132

[Title of Cause.]

PETITION FOR REVIEW BY THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

Blumenfeld Enterprises, Inc. respectfully petitions this honorable Court to review the decision of The Tax Court of the United States entered in the above-entitled cause on March 23, 1955, determining a deficiency in income tax for the fiscal year ended July 31, 1948 in the amount of \$31,405.31.

I. Jurisdiction

Petitioner is a corporation organized and existing under the laws of the State of California.

Petitioner filed its Federal income tax return for its taxable year ended July 31, 1948 with the Collector of Internal Revenue for the First District of California, which is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Jurisdiction of this Court to review the aforesaid decision of The Tax Court of the United States is founded on Sections 7482 and 7483 of the Internal Revenue Code of 1954.

II. Nature of Controversy

The controversy herein involves the following issue, which was presented to The Tax Court:

1. Whether a loss forming part of petitioner's net operating loss carry-back from its taxable year ended July 31, 1950 to its taxable year ended July 31, 1948 and allowable as a deduction for income tax purposes for its taxable year ended July 31, 1948, was incurred by the petitioner as a result of the demolition during its taxable year ended July 31, 1950 of the Tivoli Theatre property.

Wherefore, the petitioner petitions that the findings of fact and opinion and decision of The Tax Court of the United States in the above-described cause be reviewed by the United States Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court and be transmitted to the Clerk of the said Court of Appeals for filing, and that appropriate action be taken to the end that the errors of The Tax Court may be reviewed and corrected by said Court of Appeals.

Dated: June 13, 1955.

/s/ SAMUEL TAYLOR,

/s/ WALTER G. SCHWARTZ,
Counsel for Petitioner

Duly Verified.

[Endorsed]: T.C.U.S. Filed June 15, 1955.

The Tax Court of the United States
Washington

[Title of Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 35, inclusive, constitute and are all of the original papers and proceedings called for by the Designation of Contents of Record on Review [excepting the original exhibits, which are separately certified and forwarded herewith, being Joint 1-A to 5-E, inclusive, attached to the stipulation of facts, Petitioner's 6 to 12, inclusive, and Respondent's G and H (F and I were marked for identification only and not left with record)], on file in my office in the above proceeding, and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 12th day of July, 1955.

/s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States

The Tax Court of the United States

Docket No. 39,132

BLUMENFELD ENTERPRISES, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PARTIAL TRANSCRIPT OF PROCEEDINGS

Room 421, Appraisers Building, 630 Sansome St.,
San Francisco, California, Tuesday, March 16,
1954—10:00 a.m.

(Met, pursuant to notice.)

Before: Honorable Arnold Raum, Judge.

Appearances: Samuel Taylor, Esq., Walter G. Schwartz, Esq., and Robert O. Folkoff, Esq., 1308 Balfour Bldg., San Francisco, Calif., appearing for the Petitioner. Leonard Allen Marcussen, Esq., (Honorable Daniel A. Taylor, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Respondent. [1*] * * * * *

Whereupon,

ABE BLUMENFELD

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name and address.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Abe Blumenfeld.)

The Witness: Abe Blumenfeld; my residence is in Marin County, San Rafael. My business address is 70 Eddy Street, San Francisco.

Direct Examination

Q. (By Mr. Taylor): Mr. Blumenfeld, are you an officer of Blumenfeld Enterprises, Inc., the taxpayer herein?

A. I am a director and secretary of that corporation.

Q. When was it incorporated?

A. It was incorporated on June 18, 1945. These are dates I picked off my books because I wanted to be accurate.

Mr. Marcussen: I have no objection to that.

The Witness: They are just memos of dates.

Q. (By Mr. Taylor): Will you state what the business of Blumenfeld Enterprises, Inc., is? [15]

A. It is a corporation which owns and operates theatres and other businesses.

Q. And has that been true from the date of its incorporation down to the date of this trial?

A. It is.

Q. Will you state whether you were the officer of Blumenfeld Enterprises, Inc. who had charge of the negotiations for the lease of October 6, 1949, between Blumenfeld Enterprises, Inc. and Harry Marofsky Exhibit 3-c to the stipulation?

A. Yes.

Q. Will you describe what the Tivoli property is?

(Testimony of Abe Blumenfeld.)

A. The Tivoli property consists of, or consisted at the time the lease was entered into, of a parcel of ground at 70 Eddy Street, upon which stood two adjacent but separate buildings.

The building facing on Eddy Street was an office building, and at the rear portion of the property was a theatre building, a very small portion of which was attached to the front building by a common party wall. The entrance to the theatre portion was on the ground floor of the office building.

Q. The two were separate and independent buildings, were they?

A. Yes; both separate buildings.

Mr. Marcussen: You mean theatre buildings and [16] office buildings?

The Witness: Yes; two distinct buildings.

Q. (By Mr. Taylor): Had the Tivoli Theatre at one time been used as an opera house in San Francisco?

A. Yes, the Tivoli Theatre was a famous landmark in San Francisco in the theatrical world, but had become obsolete because the district had deteriorated around it.

Q. Will you state, if you know, how old the theatre building was?

A. I believe over 50 years. I think it was 40 years, rather. I think it was built in 1911.

Mr. Taylor: I ask that these four pictures be marked for identification, 6, 7, 8 and 9.

(Testimony of Abe Blumenfeld.)

(The documents above referred to were marked Petitioner's Exhibits 6, 7, 8 and 9 for identification.)

Q. (By Mr. Taylor): I show you Exhibits for identification, being pictures, and marked as Petitioner's Exhibits 6, 7, 8 and 9 and ask you to state what these are.

A. These are photographs of the existing office building which faces on Eddy Street, and pictures of the parking lot where the theatre originally stood.

Q. When were these taken?

A. Last week. [17]

The Court: The parking lot pictures are Exhibits 6 and 9 for identification?

The Witness: Yes, sir.

The Court: And what are Exhibits 7 and 8 for identification?

The Witness: Those are the office building, your Honor.

Q. (By Mr. Taylor): Referring to Exhibit 7 for identification, the area under the marquee there, is that where the entrance to the theatre was?

A. Yes; that was formerly the lobby and the foyer of the theatre.

Q. And that has now been torn out and is used for parking? A. That is right.

Q. And the area in Petitioner's Exhibits 9 and 6, that is the area where the theatre building was?

A. That is right.

Q. And is now used as a parking lot?

A. That is correct.

(Testimony of Abe Blumenfeld.)

Q. In Petitioner's Exhibits for identification, 7 and 8, that shows the existing office building, does it? A. That is right.

Q. Who are the tenants of that office building?

A. The third floor of the building is occupied by Blumenfeld Enterprises, Inc.

Q. The Petitioner herein?

A. The Petitioner herein, as its main office. The second floor is occupied by the Variety Club of Northern California; the ground floor, one portion of the ground floor, is occupied by a cocktail lounge and bar and another portion by the entrance to the office building; the other portion is for a parking area.

Q. Cocktail lounge is known as the Silver Dollar? A. It is.

Q. And were these the tenants at the time of the lease of October 6, 1949? A. They were.

Mr. Taylor: I offer Petitioner's Exhibits for identification 6, 7, 8, and 9 into evidence.

Mr. Marcussen: No objection.

The Court: They are admitted.

(The documents referred to were received in evidence as Petitioner's Exhibits 6, 7, 8 and 9.)

The Court: We have had a good deal of discussion about the destruction of this theatre building.

I would like to inquire of counsel whether the fact of the destruction and the time thereof is established by the [19] stipulation, and if not whether you intend to produce evidence.

(Testimony of Abe Blumenfeld.)

Mr. Taylor: We intend to have Mr. Blumenfeld testify as to that.

Mr. Marcussen: I think that is all that is material, if your Honor please.

The Court: I was just making an inquiry.

Mr. Taylor: My purpose in introducing these pictures is to give some life to this so you can see just what happened.

Q. (By Mr. Taylor): After Blumenfeld Enterprises, Inc. acquired the theatre property, will you state what it was used for?

A. It was used for the presentation of motion pictures, stage shows and vaudeville shows.

Q. Until about when?

A. Until about 1947 when it was closed because it was economically impractical to keep it running.

Q. Were you losing money on it? A. Yes.

Q. Why?

Mr. Marcussen: Object to the question, if your Honor please, on the ground that it is completely immaterial whether he was losing money on this in 1946.

We have here a demolition loss in 1950. We have stipulated facts showing the execution of the leases and whether or not Petitioner was making money when he was [20] operating it prior to the lease is wholly immaterial to the issues in this case.

The Court: Well, it is background material, I take it?

Mr. Taylor: That is right.

The Court: The question may be answered.

(Testimony of Abe Blumenfeld.)

Mr. Taylor: Will you read the question, please?

(Question read.)

A. Well, the district in which the theatre was located had become not a desirable theatrical district and it had become a tenderloin district. There were innumerable bars and cocktail lounges in the area, and the theatre location was away from the main theatre and entertainment districts.

Furthermore, the buildings had become very obsolete and——

Mr. Marcussen: Object to that; that is the witness's conclusion, and again is not material to any of the issues in this case. I would like to ask counsel whether he proposes to amend the pleadings on the basis of this proof, and if he does, I submit it is not in issue and should all be stricken.

Mr. Taylor: It seems to me this is just background material, just having a bearing on the question of the intent. As we understand the law, it is very significant here just what was the intent of the parties at the time when the lease was entered into and when the intent to tear down this building [21] first arose, and this is all background material to show just how this place happened to be entered into and why there was an agreement to tear down the building after it was found that a multi-storied garage couldn't be constructed.

Your Honor, upon studying the record, may or may not consider it material, but I think it is helpful to show the entire picture.

The Court: This general background material is permissible. I would prefer you ask the witness

(Testimony of Abe Blumenfeld.)

specific questions rather than let him roam at large.

Mr. Marcussen: I would like to be heard. The entire history of the world up to this point is background material to this event, but they don't have any materiality to what happened here, and if the Petitioner has a purpose to amend, it shouldn't be offered.

The Court: If it is not material it won't have any effect at all. Within reasonable limits I will permit counsel to develop what led up to the destruction of this building.

Mr. Taylor: Just a question or two, your Honor, to show the entire picture.

Would you please read the last question?

(Question read.)

Mr. Marcussen: I would like to move to strike the testimony with respect to obsolescence; that is not an issue in this proceeding, and I feel that is not proper background [22] under any manner of interpretation.

The Court: Mr. Taylor, do you want to ask the witness to rephrase his answer in that connection? The Government's objection may be technically accurate if the term "obsolescence" is being understood in a technical sense.

Q. (By Mr. Taylor): Will you state whether, prior to the lease of October 6, 1949—just immediately prior thereto—the theatre building had any usefulness?

Mr. Marcussen: Object to this on the ground it is leading, if your Honor please.

(Testimony of Abe Blumenfeld.)

Mr. Taylor: I am attempting to restate it so as to take out the word that you object to.

Mr. Marcussen: Well, could you stipulate to a motion to strike the word? That is simply the easiest way, and I submit it to your Honor, to strike his testimony that the building became obsolete.

The Court: I think we are wasting a good deal of time on this. I will permit the word "obsolete", or whatever the form of that word was used to stand, and I will understand it to be used in a colloquial rather than a technical sense.

Mr. Taylor: I am somewhat at a loss as to the point of counsel's objection.

I must ask you again to read the last question and answer. [23]

(Question and answer read.)

Mr. Marcussen: Same objection, your Honor. I am not trying to be technical here, but I have had negotiations with counsel, and I have a reason to anticipate difficulties upon the conclusion of this case with respect to the issues involved. I feel that we should try this case strictly on the pleadings and not refer to issues.

The Petitioner is going to contend, I anticipate, that he is entitled to a deduction for the value of the remaining cost of the building upon the execution of the lease for other reasons. That is not an issue here. We are taken by surprise by it.

The Court: It hasn't been raised.

Mr. Taylor: I frankly don't know what counsel is talking about. We stated in the opening state-

(Testimony of Abe Blumenfeld.)

ment what we understood the single issue to be, and I don't know what counsel is fearful of.

The Court: I am going to permit this testimony to continue within reasonable limits, and if the Government is caught by surprise upon any attempt to raise any new issues at a later time, I will hear the Government on it at that time.

At this point the testimony may continue.

Mr. Taylor: Very well. May he answer the last question, your Honor?

The Court: You have had the reporter read the last [24] question back to you several times.

There is no question pending before the witness, as I understand it, at this point.

Mr. Taylor: Very well.

Q. (By Mr. Taylor): Will you state whether, just immediately prior to the execution of the lease of October 6, 1949, the theatre building, Tivoli Theatre building, had any usefulness as a theatre?

A. We didn't feel it had any.

Mr. Marcussen: I have no objection to the witness using this memorandum for his testimony. I do, however, wish to have it understood that Respondent objects to this entire line of inquiry.

Q. (By Mr. Taylor): Will you state what this theatre building was used for from the time that you acquired it—that Blumenfeld Enterprises, Inc., acquired it?

A. During the period from February 10, 1946, through March 2, 1946, it was used for legitimate stage performances.

(Testimony of Abe Blumenfeld.)

Then it was used for the presentation of motion pictures from March 3, 1946, to June 2, 1947, at which time it closed until March 30 of 1948. Then it was leased for three days only from March 31 to April 2, 1948, when it was rented to an outside show.

Then it was closed again and remained closed until October 6, 1949, the date of the lease to Hertz.

Mr. Marcussen: I would like to offer that for identification as Respondent's next in order.

The Clerk: Exhibit 10.

The Court: That is the paper the witness has been using to refresh his recollection.

The Clerk: That should be Exhibit F.

(The document above referred to was marked as Respondent's Exhibit F for identification.)

Mr. Taylor: That is the paper the witness prepared from his records to testify from.

Q. (By Mr. Taylor): Will you state whether, after the theatre was closed the last time in March, 1948, whether Blumenfeld Enterprises, Inc. anticipated using the theatre again?

Mr. Marcussen: Object to the form of the question as leading, if your Honor please.

The Court: Let him complete the question.

Q. (By Mr. Taylor): —theatre building again as a theatre building.

Mr. Marcussen: Respondent objects on the ground it is leading. The damage is done because the question is asked, but I feel counsel should be admonished not to ask [26] leading questions.

The Court: Well, I don't think that question is objectionable.

(Testimony of Abe Blumenfeld.)

Q. (By Mr. Taylor): Please answer it.

A. We had no intention of using the theatre again as a theatre.

Q. Why?

A. Because it was outmoded and we kept losing money every time we opened it.

Q. Will you state whether Blumenfeld Enterprises, Inc. considered at that time, or prior thereto, or subsequent thereto, changing the theatre building into an office building?

Mr. Marcussen: Same objection.

The Court: Overruled.

Q. (By Mr. Taylor): Answer, please.

A. We had discussed between the officers what we could do with the building, and it was our judgment that it would be much too costly to convert it into anything for our use.

Q. And that was true just prior to the time that the lease of October 6, 1949 was entered into?

A. That is right.

Q. Will you state the circumstances under which you entered into the lease of October 6, 1949, Exhibit 3-c to the [27] stipulation?

A. I was approached by a real estate agent by the name of Rose, who asked if we would consider leasing the premises for garage purposes, and after negotiating through him with the lessee, we entered into a lease for the reconstruction of the building into a five-story garage.

Q. Will you state who you considered as the real lessee here?

(Testimony of Abe Blumenfeld.)

Mr. Marcussen: Object to that, your Honor, on the ground that it is stipulated who the lessee is. I don't know what a real lessee is other than the lessee named in the stipulation.

Mr. Taylor: If the Court please, this lease is entered into in the name of a Mr. Marofsky, who is here in the courtroom. The real lessee, Mr. Marofsky, the evidence will show, was a dummy. The real lessee was Herman Hertz, who is here in the courtroom.

I propose to offer the testimony of Herman Hertz as to his version of the transaction. I think it is necessary for me to show that the man that really is the lessee here is Herman Hertz. He also will testify, else Mr. Hertz' testimony has no significance.

The Court: Of course, it is very common in business transactions to use a straw man.

Mr. Taylor: That is all I mean. [28]

The Court: And perfectly appropriate to bring that out. I think the question might be phrased more aptly.

Mr. Taylor: May I strike the question?

Q. (By Mr. Taylor): In your negotiations did you ever deal with Harry Marofsky?

A. I had no dealings with him.

Q. Did you deal with a Herman Hertz?

A. I did.

Q. Will you state whom Blumenfeld Enterprises, Inc. considered as the real party in interest here?

Mr. Marcussen: Same objection, if your Honor

(Testimony of Abe Blumenfeld.)

please, on the ground that the stipulation in several places refers to Harry Marofsky as the lessee, and at this time to come in and show that somebody else is the real party in interest, I submit, is too late. It is stipulated that this man is the lessee. He is referred to as the lessee.

The Court: I will let counsel ask the witness outright whether the purported lessee was the straw man.

Mr. Marcussen: Same objection.

Q. (By Mr. Taylor): Will you state whether Harry Marofsky was the straw man?

A. He was.

Q. Who was the real lessee? [29]

A. Herman Hertz.

The Court: I am admitting this testimony, however, not for the purpose of contradicting anything in the stipulation, but merely for the purpose of showing the surrounding circumstances involved in the transaction.

Mr. Taylor: If the Court please, we are quite happy with that. We don't intend to, and don't think we are, contradicting anything in the stipulation.

Mr. Marcussen: Respondent's objection is based on the further ground that it represents this witness's conclusion. The witness is competent only to testify as to what negotiations he actually entered into and what was said and done.

I think that rule should be strictly enforced, particularly in view of the fact that it is stipulated that the lessee is Harry Marofsky.

(Testimony of Abe Blumenfeld.)

The Court: Well, the witness testified that he conducted his negotiations with someone other than Mr. Marofsky.

Mr. Marcussen: Who is the real party in interest is probably a question of law. This witness isn't a lawyer and it isn't competent.

Mr. Taylor: If the Court please, this is utterly inconsequential and immaterial.

The Court: Off the record. [30]

(Discussion off the record.)

The Court: On the record.

Q. (By Mr. Taylor): Will you state what transpired after the lease of October 6, 1949 was executed?

A. I believe we were presented with preliminary plans at that time.

Mr. Taylor: I would like to mark for identification as Petitioner's Exhibit next in order four pages to the blueprints, stapled together.

The Clerk: Exhibit 10 for identification.

(The document above referred to was marked Petitioner's Exhibit 10 for identification.)

Q. (By Mr. Taylor): I show you Petitioner's Exhibit 10 for identification, being certain blueprints designated "Preliminary Arrangement and Longitudinal Sections, Alterations, Tivoli Theatre," and apparently bearing your name thereon.

State whether you signed those blueprints.

A. I did.

Q. And what date does that show?

(Testimony of Abe Blumenfeld.)

A. November 22, 1949.

Q. Will you state what these blueprints pertain to?

A. These were the preliminary proposals for the reconstruction of the Tivoli Theatre building into a multi-storied [31] garage building.

Q. Does your signature thereon indicate that you approved them? A. It does.

Mr. Taylor: I offer these in evidence, Petitioner's Exhibit 10 for identification.

Mr. Marcussen: No objection.

The Court: Admitted.

(The document above referred to was received in evidence as Petitioner's Exhibit 10.)

Mr. Taylor: I request permission, your Honor, to withdraw this exhibit for use by counsel on both sides in the preparation of the brief, and thereafter we can mail them to the Court.

The Court: It may be withdrawn in accordance with the rules upon giving an appropriate receipt.

Mr. Taylor: Very well.

Mr. Marcussen: If your Honor please, at this time I am inquiring of counsel as to when he thinks he will be through this case, approximately, so we can release a witness to come back later.

The witness is Mr. Marofsky himself, whom we have under subpoena, and he desires to go at this time and I don't desire to hold him unnecessarily. He is actually operating this parking lot right now, and I realize he is here at some [32] sacrifice.

So I would like to inquire of counsel approxi-

(Testimony of Abe Blumenfeld.)

mately how long he thinks his case is going to take.

Mr. Taylor: Well, your Honor, I figured that the entire case would be through by noon. As a matter of fact, I made an appointment for two o'clock on that assumption. If counsel will not object too much, I still think I will be through.

Mr. Marcussen: I am going to object whenever I feel it is necessary.

The Court: I am going to recess shortly before twelve. I suggest that if we proceed with the trial, instead of with all these matters, that we will be through sooner.

Mr. Taylor: I ask this be marked as Petitioner's Exhibit for identification, a set of blueprints consisting of many pages, designated Lodvick and Associates, "Footing plan for conversion of the Tivoli Theatre into a five-story garage," and bearing the date December 1, 1949.

The Clerk: Exhibit 11.

(The document above referred to was marked Petitioner's Exhibit 11 for identification.)

Mr. Taylor: I ask that be marked as Petitioner's Exhibit for identification, a pamphlet of 37 pages entitled "Specifications for Conversion of Tivoli Theatre to Five-story Garage, George Lodvick and Associates, Consulting [33] Engineers," which specifications go with Petitioner's Exhibit 11.

The Clerk: Exhibit 12.

(Testimony of Abe Blumenfeld.)

(The document above referred to was marked Petitioner's Exhibit 12 for identification.)

Q. (By Mr. Taylor): I show you Petitioner's Exhibits 11 and 12 for identification, being the blueprints and specifications that you have just heard me refer to.

I ask you whether these were presented to you, and if so, when?

A. These were presented to me by the lessee about three or four weeks after the preliminary plans were approved.

Q. I note that they bear the date December 1, 1949. Were they presented to you about that time?

A. On or about that time.

Q. Did you approve them on behalf of the lessor? A. I did.

Q. What do these represent?

A. These are the final detailed plans and specifications.

Q. For changing the Tivoli Theatre into a five-story garage? A. They are.

Mr. Taylor: I ask these be admitted into evidence.

Mr. Marcussen: No objection. [34]

The Court: 11 and 12 are admitted.

(The documents above referred to were received in evidence as Petitioner's Exhibits 11 and 12.)

Mr. Taylor: And I ask leave to withdraw them

(Testimony of Abe Blumenfeld.)

for use by counsel in accordance with the rules.

The Court: They may be so withdrawn.

Q. (By Mr. Taylor): Will you state whether there was any discussion of demolishing the Tivoli Theatre building at or prior to the time the lease was entered into?

A. There never was any discussion or contemplation of demolishment.

Q. At that time? A. At that time.

Mr. Marcussen: You are talking about the lease of October 6, 1949?

The Witness: The original lease.

Q. (By Mr. Taylor): Will you state, if you know, what happened after the lease was entered into and the present plans and specifications, Exhibits 9, 10 and 11—no, 10, 11 and 12 were submitted to you?

A. Well, the lessee applied to the City and County of San Francisco for a permit for the re-conversion and reconstruction of the Tivoli Theatre building, and the City demanded at [35] that time that they make some very costly structural changes in the building itself, which made the cost prohibitive. The lessee then felt that it was economically unfeasible to proceed. Subsequently thereto, he came to me and asked me for permission to demolish the building.

Q. About when was that?

A. Well, I am not sure of the dates. It was several months after the permit was applied for.

(Testimony of Abe Blumenfeld.)

Q. Was that the first time that anyone had raised any question of demolishing the building?

A. Yes.

Q. Or tearing down the building had been considered by you?

A. That is the first time.

Q. Upon the execution of the lease of October 6, 1949, will you state whether the lessee took immediate possession of the property?

A. He did immediately.

Q. What did the lessee do?

A. Well, he proceeded to remove the interior doors and plumbing fixtures, lighting fixtures, and get ready for the conversion job.

Q. And to prepare the plans and specifications?

A. Yes.

Q. Will you state why the lease, although executed in [36] October, 1949, provided for no payment of rental until May 1, 1950?

A. Yes. We realized that there was a period of six to eight months that the lessee would be reconstructing the building, with no income, but we felt it was fair, under the circumstances, to commence rent payments on or about the date that we felt he would be open for business.

Q. Will you state why Blumenfeld Enterprises agreed to the demolition of the building as provided in a letter of April 24, 1950, Exhibit 4-b?

You are familiar with that letter of agreement, are you not?

A. I think I am. I would like to see it.

(Testimony of Abe Blumenfeld.)

Q. I show you Petitioner's Exhibit 4-b to the stipulation, being the letter of agreement of April 21, 1950.

You are familiar with that?

A. Yes, I am.

Q. Will you state now why Blumenfeld Enterprises, Inc. agreed to the demolition of the theatre building as provided for in that letter of agreement?

A. If the City and County of San Francisco made it prohibitive to convert the theatre building into a garage—which they did—we felt that we would be equally as well off with a vacant lot as with an obsolescent theatre building; since the lessee asked for permission to demolish it, we agreed [37] to it.

Q. Will you state when the building was demolished; by what time was the building demolished?

A. I believe the razing of the building commenced in March of 1950, and by the latter part of July it was substantially demolished.

Q. When you say March, since the agreement for its demolition was dated April 24, 1950, do you mean March or do you mean after the date of the agreement?

A. After the date of the agreement.

Q. It commenced in April?

A. Well, that is the reason I had that memo of dates.

Q. And it was practically completely demolished by July 31, 1950?

(Testimony of Abe Blumenfeld.)

A. Yes; virtually completely demolished.

Q. Did Blumenfeld Enterprises, Inc. obtain any salvage? A. None whatsoever.

Q. Did Blumenfeld Enterprises, Inc. obtain any reimbursement from any insurance company or any other kind of reimbursement? A. None.

Q. Referring to the lease of October 6, 1949, Exhibit 3-c, sub-paragraph B of paragraph 29 of said lease, this refers to reconstruction of the Tivoli Theatre property to be made in accordance with certain plans and specifications bearing the [38] date of blank.

I ask you whether the plans and specifications referred to in sub-paragraph are the ones which have been introduced into evidence here as the final plans and specifications?

A. They are referring—

Q. Referring to sub-paragraph (g) of said paragraph 29 of said lease, I call your attention to the fact that this sub-paragraph provides that “the lessor shall remove all personal property in the Tivoli Theatre building, all chairs, drapes, fixtures, carpets and miscellaneous light property.”

Did Blumenfeld Enterprises, Inc., as lessor, remove said property before the building was demolished? A. It did.

Q. Or before the lease commenced?

A. That is right.

Q. It was removed?

A. Before the property was turned over to the lessee.

(Testimony of Abe Blumenfeld.)

Q. So that all that was demolished was the building itself? A. That is right.

Q. And the only loss claimed by the taxpayer was the loss in the demolition of the building?

A. That is right.

Q. No loss was claimed for personal property?

A. None.

Q. Or for equipment? A. None.

Q. Referring to the letter of April 24, 1950, Exhibit 4-d to the Petition, I call your attention to the fact that this document grants to the lessee permission to demolish the rear portion of the premises for purposes conforming to the lease.

Will you state what is meant by the "rear portion of the premises"?

A. Theatre building only.

Q. Which was in front?

A. That is right.

Q. Again referring to said letter of April 24, 1950, I call your attention that said letter states that "the lessee shall furnish to the lessor modified plans showing the proposed basement and ground floor development and shall secure from the lessors written permission for said development."

Will you explain, if you know, what that reference is to?

A. Yes; during the demolishment, the lessee thought that he might be able to develop a ground-level parking lot with a basement for additional parking, but that never developed and he filled in

(Testimony of Abe Blumenfeld.)

the basement and ended up with just a surface-level parking lot. [40]

Q. When the theatre building was in existence, both before and after the lease of October 6, 1949, will you state whether Blumenfeld Enterprises, Inc. took depreciation upon its basis for the theatre building? A. It did.

Q. And it showed that both on its books and in its tax returns? A. It did.

Q. Will you state whether there was any understanding in connection with permission granted to the lessee to demolish the theatre building with the lessee constructing some new building?

A. I am sorry, I didn't get that.

Mr. Taylor: Will you read the question, please?
(Question read.)

A. No. There never was any demand to reconstruct any kind of a building.

Mr. Taylor: Your witness.

Cross Examination

Q. (By Mr. Marcussen): Mr. Blumenfeld, I show you Petitioner's Exhibit 8, which is a picture, a diagonal picture taken at an acute angle of the front of the building. I notice that immediately to the right of the building, as it appears in the picture, there is also a parking lot. [41]

That lot was not part of the premises?

A. No.

Q. Showing you Exhibit 9, I call your attention to the fact that the picture indicates a parking area

(Testimony of Abe Blumenfeld.)

to the left of the operator's booth here in the lower left-hand corner. This is the same area?

A. That is the same area.

Q. Shown on the other Exhibit and it doesn't constitute any part of the property?

A. That is correct.

Q. That property was later acquired by——

A. Later acquired by the lessee.

Mr. Marcussen: That is all, your Honor.

Mr. Taylor: That property that was later acquired by the lessee, was not acquired from Blumenfeld Enterprises, Inc.

The Witness: No; we never had any interest in it.

Mr. Taylor: Thank you. That is all.

(Witness excused.)

Whereupon,

HERMAN HERTZ

was called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address. [42]

The Witness: My name is Herman Hertz; my office address is 334 Sutter Street. I live in Oakland.

Direct Examination

Q. (By Mr. Taylor): Are you the gentleman who signed as a guarantor on the lease of October 6, 1949, which has been introduced into evidence here?

A. I did.

(Testimony of Herman Hertz.)

Q. Who is Harry Marofsky, the lessee on that lease?

A. Harry Marofsky is my brother-in-law.

Q. Did you handle the negotiations for the lease, for said lease of October 6, 1949? A. I did.

Q. How did Mr. Marofsky's name happen to get on that lease?

Mr. Marcussen: Object to that, if your Honor please.

Mr. Taylor: State if you know.

Mr. Marcussen: The document speaks for itself and the stipulation speaks for itself, and it shows that Harry Marofsky is the lessee; that is the basis of our objection. There is no reason for going into how his name got there. The fact speaks for itself, if your Honor please.

The Court: Well, I take it the Petitioner isn't challenging the fact that Mr Marofsky was the lessee. I take it that the Petitioner is undertaking to establish the [43] relationship between the lessee and the guarantor.

Mr. Marcussen: If that is the purpose of the question, my objection is withdrawn.

Mr. Taylor: Yes, your Honor. The point is simply this. We have shown, we think, intent is a material factor here—what was the intent of the parties?

We have shown from Mr. Blumenfeld what was the intent as a lessor, and we want to show from Mr. Hertz what was the intent of the lessee. On the face of the lease, the man's name is Marofsky. We have to show why we are calling Hertz, and that is

(Testimony of Herman Hertz.)

the whole point. It never occurred to me that anyone would object to a thing like that.

Mr. Marcussen: You have explained your calling Mr. Hertz by stating he conducted the negotiations. My objection is not addressed to that question, but to the question as to how Harry Marofsky's name got to the lease. What do we care about that here? If Mr. Taylor will say he doesn't care——

Mr. Taylor: I don't care how it got on the lease except I want to show Mr. Hertz is qualified to know what went on at the time of the negotiations and at the time of the subsequent demolition.

The Court: Are you objecting, Mr. Marcussen, to this witness speaking authoritatively on behalf of the lessee?

Mr. Marcussen: No. [44]

Mr. Taylor: That is all I want.

The Court: That washes out the entire problem at this point, does it not?

Proceed.

Q. (By Mr. Taylor): Will you state how Mr. Marofsky's name got on the lease?

A. Harry Marofsky, being my brother-in-law, after he came back from the service, he was trying to find ways and means how to make a living. So my wife thought it was my job to help him. So he thought he wanted to go in a parking lot or garage where he could make a living, and Mr. Blumenfeld wanted to have someone to make certain guarantees, so we got the lease for Harry Marofsky and me guaranteeing that lease.

(Testimony of Herman Hertz.)

Q. Were you Mr. Marofsky's financial backer?

Mr. Marcussen: Object to that, if your Honor please, on the ground it is a conclusion.

Mr. Taylor: Strike it.

Q. (By Mr. Taylor): Will you state whether you were familiar with all the negotiating pertaining to the lease? A. I was.

Q. And were you the one who was familiar on the part of the lessee with what transpired right down to the date of this trial pertaining to the lease? [45] A. That is correct.

Q. And if Marofsky is familiar with these things—is he as familiar as you are? A. No.

Mr. Marcussen: Object to that on the ground Mr. Marofsky is the best witness for that, if your Honor please. He doesn't know what Mr. Marofsky is familiar with and what he isn't; on the further ground the question is indefinite.

Q. (By Mr. Taylor): Did Mr. Marofsky know anything about the negotiations pertaining to the lease?

Mr. Marcussen: Excuse me just a minute.

Mr. Taylor: I withdrew the question.

Mr. Marcussen: Thank you; I didn't understand that.

The Witness: I don't quite get you.

Q. (By Mr. Taylor): Did Mr. Marofsky know anything pertaining to the negotiating of the lease of October 6, 1949?

Mr. Marcussen: Object to it on the ground that

(Testimony of Herman Hertz.)

Mr. Marofsky—well, same objection, if your Honor please. He can call Mr. Marofsky to explain that.

The Court: Well, Mr. Taylor, I think it has been established, or at least the Government doesn't object to this witness being the authoritative spokesman on behalf of the lessee. [46]

I think you qualified him for that purpose.

Mr. Marcussen: That isn't what I meant to say. I understood, your Honor, when you asked me that question, simply to inquire whether I have any objection to this witness testifying to the negotiations that he conducted; that is, whether he was speaking for Mr. Marofsky, and that is all I intend to do. I didn't waive any objections to his testifying to what Mr. Marofsky knows or did or anything else. I objected to his testifying for Mr. Marofsky, not however, with respect to things that this witness did when he was representing Mr. Marofsky. There is a vital distinction.

Mr. Taylor: If it is understood Mr. Hertz is the authoritative spokesman for the lessee, I won't ask any more questions.

Mr. Marcussen: Do you mean authoritative spokesman for Mr. Marofsky at the time he conducted the negotiations or now on the stand?

Mr. Taylor: Mr. Marofsky is here now and you have called him and you can ask anything you want. I am trying to establish the background of this man to show that he knows what he is talking about.

Mr. Marcussen: Let the record show that I don't know what Mr. Taylor means by his understanding

(Testimony of Herman Hertz.)

that this witness was the authorized spokesman, and I would like to have a clarification of it without changing the subject. [47]

Let's clarify that one point.

Mr. Taylor: It is easier to ask the witness.

The Court: There is too much confusion here. I am addressing myself to the witness.

Did you conduct the negotiations in connection with the execution of this lease?

The Witness: I did, your Honor.

The Court: And you were the one who dealt with Blumenfeld Enterprises?

The Witness: Yes, sir.

Q. (By Mr. Taylor): And did you conduct the negotiations in connection with the letter of agreement of April 24, 1950, pertaining to the demolition of the theatre building?

A. Yes; this was a part of the negotiations, wasn't it?

Q. Will you state the circumstances under which the lease of October 6, 1949, the circumstances under which the lease of October 6, 1949 was negotiated?

A. What do you mean by "circumstances"? Do you mean the purpose of it?

Q. Yes.

A. Well, it was our intention to take this theatre building, Tivoli, and make a garage out of it.

Q. Did you take immediate possession of the property [48] after October 6, 1949?

A. We did.

Mr. Marcussen: If your Honor please, I object

(Testimony of Herman Hertz.)

to the form of the question and ask that it be stricken on the ground that there is no showing—the question necessarily implies that Mr. Hertz here is one of the principals, and the record does not show that.

Mr. Taylor: Mr. Marcussen, I will rephrase the question.

Q. (By Mr. Taylor): Did the lessee take immediate possession of the property after the execution of the lease of October 6, 1949? A. We did.

Q. Will you state what the lessee did with regard to the preparation of plans and specifications for converting the Tivoli Theatre building into a garage building?

A. Well, while the negotiations went on, we consulted with an engineer, or architect, and we wanted to know what it will cost to convert it. So while the negotiations went on, we consulted with this engineer as to whether the job can be done and how much it would cost.

Does that answer your question?

Q. Yes. Did that engineer prepare plans and specifications for conversion into a five-story garage? A. He did. [49]

Q. I show you Petitioner's Exhibits 10, 11 and 12. Will you look at these and state if these are the plans and specifications which were prepared.

A. These are the plans that were prepared.

Q. Petitioner's Exhibit 10, are those the preliminary plans?

A. Those were the first plans.

(Testimony of Herman Hertz.)

Q. And Petitioner's Exhibits 11 and 12, are those the final plans and specifications?

A. Yes; this was the detail.

Q. The final ones? A. Yes.

Q. Did the lessee pay the engineer for preparing these plans and specifications?

A. We did.

Q. Will you state how much?

A. I don't remember exactly; it would be about \$3,000 or \$4,000, I believe.

Q. Will you state at or prior to the time the lease was entered into, did the lessee or anyone, you on behalf of the lessee, give any thought to demolishing the theatre building? A. No.

Q. Was the thought to convert the building into a five-story garage? [50] A. Exactly.

Q. There was no discussion of demolishing the theatre building at that time? A. No.

Q. Will you state what, at the time the plans and specifications were prepared, the engineer, Mr. Lodvick's estimate was for reconverting the theatre building into a five-story garage?

A. It was somewhere between \$45,000 and \$50,000.

Q. Will you state whether the lease was executed on the assumption of a cost of 45 to 50 thousand for reconversion? A. That is correct.

Q. Will you state what transpired after the plans and specifications, Exhibits 11 and 12 for the conversion of the theatre building into a five-story garage, what transpired?

(Testimony of Herman Hertz.)

A. Well, in order to start working we had to get a permit, but Mr. Lodvick a few weeks later advised us he couldn't—

Q. A permit from whom?

A. From the City of San Francisco.

Q. And Mr. Lodvick was not able to get that permit?

A. No; he was not able to get it.

Q. Will you state, if you know, why the permit was refused?

A. Well, if I remember correctly, he explained to us [51] that the building was not good enough or strong enough to be converted into a garage. I remember distinctly asking him how come the building that was good enough for the housing of people is not strong enough for a car, and he told me that he just can't get a permit, or that certain things had to be done, strengthening the walls, and so on.

Q. Did he indicate what it would cost to meet the City's conditions to obtain a permit?

A. He took a few weeks' time to do some work and informed us that it would cost upwards of \$125,000.

Q. And did you or anyone on behalf of the lessee consider spending such an amount in the reconversion of the building?

A. No. We didn't feel that we could ever get our money out, or that much money out of it.

Q. So the City's condition for a permit killed the five-story garage plan, did it?

A. That is correct.

(Testimony of Herman Hertz.)

Q. When was that?

A. What do you mean?

Q. About what date did this transpire?

A. I don't know. That would be about, say a month or two after these completed plans were done.

Q. About January or February of 1950?

A. I would say so. [52]

Q. When you found the City was making the re-conversion job too expensive, what did the lessee then do?

A. Oh, for weeks we were confused. We didn't know what to do. We were in and didn't know what to do, and for two or three months we didn't do anything until I was advised to see another engineer, and I did.

I did consult another engineer, and after the other engineer went down to the building, I met with him and he told me that nothing can be done; if we wanted to convert it, we would have to meet the City's requirements. He told me further that as an engineer he believed it to be a mistake, and that the best thing would be to demolish the building.

Q. A mistake because it wouldn't pay out?

A. Exactly.

Q. Was this the first time that it was suggested to you or to anyone on behalf of the lessee that the building be torn down? A. That is right.

Q. What transpired thereafter?

A. After thinking about it for a week or so I finally landed in Mr. Blumenfeld's office because I had to get permission to demolish it.

(Testimony of Herman Hertz.)

Q. Abe Blumenfeld? A. That is correct.

Q. Who is Mr. M. L. Rose? [53]

A. He is a real estate broker.

Q. Who represented the lessee in connection with the lease negotiations? A. That is right.

Mr. Marcussen: Represented whom?

Mr. Taylor: The lessee.

Mr. Marcussen: The lessee?

Mr. Taylor: Yes; isn't that right?

Mr. Marcussen: That is not my understanding of it. Did Mr. Rose represent you people or the lessor? What is your understanding of it, Mr. Hertz?

The Witness: I don't quite know the difference.

Mr. Marcussen: I move to strike the question and answer.

Mr. Taylor: No objection. I am simply trying to explain a few things that are not clear.

Q. (By Mr. Taylor): When the lessee originally contemplated leasing the Tivoli Theatre building, did it consider any use for the building other than as a garage?

A. We entered into negotiations with specific things in mind, to convert it into a garage, but didn't have any other use in mind at all.

Q. When the lessee found that the building couldn't be converted into a garage because of the City requirements, [54] did the lessee consider any other use for the building?

A. No; we didn't need it.

(Testimony of Herman Hertz.)

Q. Did the lessee feel that there was some other use possible for it?

A. Well, we didn't think so; as far as we were concerned.

The Court: Let's recess at this time until 2:15.

(Whereupon, at 11:45 o'clock a.m., a recess was taken until 2:15 p.m. of the same day.)

Afternoon Session—2:15 p.m.

The Court: The hearing will come to order, please.

Whereupon,

HERMAN HERTZ

resumed his testimony as follows:

Mr. Taylor: I have just a few clarifying questions and I will be through.

Direct Examination—(Continued)

Q. (By Mr. Taylor): Mr. Hertz, referring to Exhibit 4-d, the letter of agreement of April 24, 1950, I call your attention to the fact that it refers to the Tivoli Theatre property.

Will you state whether, so far as this document pertains to an option of sale, it had reference to both the theatre and the office building?

A. Yes; it had reference to both buildings.

Q. And so far as it pertained to consent to tearing down a building, it had reference to just the theatre property?

A. Yes.

Q. Mr. Hertz, referring to Exhibit 5-e, to the stipulation of facts, being an agreement dated Feb-

(Testimony of Herman Hertz.)

ruary 23, 1951, between Blumenfeld Enterprises, Inc. and Harry Marofsky, I call your attention that this seems to refer to the Tivoli Theatre building, this being an option for the purchase of the Tivoli property. [56]

Will you state whether that reference is an error, and whether actually this document covered both the theatre property and the office building?

A. The option was on both buildings, the rear and front buildings.

Q. So the reference merely to the theatre building in this Exhibit 5-E to the stipulation of facts, was an error? A. That is right.

Q. Mr. Hertz, one more clarifying question.

I show you Exhibit 2, Item P to the stipulation of facts, being a map of the properties involved, and I show you that fronting on Eddy Street next to the office building and in front of the parking area previously occupied by the theatre building, there are two areas designated as "additional parking" and "hotel", both fronting on Eddy Street; the hotel being next to that. Were these two properties a portion of the Tivoli property?

A. No. They had nothing to do with it.

Q. Simply to clarify the record, Mr. Hertz, when the option to purchase the Tivoli property, the entire Tivoli property was exercised, who acquired the property? A. The Hertz Shoe Clinic.

Q. Do you own the stock of that Clinic?

A. I own some of it.

(Testimony of Herman Hertz.)

Q. Are you the president? [57] A. Yes.

Q. Do you control the Hertz Shoe Clinic?

A. I own some of the stock; my brother and I own it.

Q. The Hertz Shoe Clinic is a corporation, is it?

A. Yes, sir.

Q. Mr. Hertz, did the lessee know at the time of the demolition whether or not the lessee would exercise the option to purchase the Tivoli property?

A. I don't quite understand you.

Q. At the time that the Tivoli Theatre was torn down, or at the time the letter of agreement of April 24, 1950, Exhibit 4-d to the stipulation, was entered into, did the lessee know at that time whether or not it would exercise the option to purchase which was given to it therein?

Mr. Marcussen: Objection, if your Honor please; this witness is not the witness to answer that question, as to what the lessee knew and didn't know.

Mr. Taylor: I tried to phrase it that way to overcome Mr. Marcussen's distinction heretofore made, simply to save time. If you consider the form of the question objectionable, I can rephrase it to ask Mr. Hertz if he knew, but I frankly don't see that there is anything to that objection.

Mr. Marcussen: It isn't a matter of form. I think it is a matter of substance. This witness isn't competent to testify as to what the lessee knew; the lessee is right here [58] in court.

Mr. Taylor: He is the man that handled everything.

(Testimony of Herman Hertz.)

The Court: Well, he was the guarantor on the lease, in any event, I take it.

Mr. Marcussen: A limited guarantor for \$10,000.

The Court: I am reasonably satisfied that he was acting on behalf of the lessee throughout the lessee's relationships with the lessor. I think the circumstances here are such that this witness may answer that question.

The Witness: Do you mind repeating it?

(Question read.)

The Witness: No, we didn't.

Mr. Taylor: Thank you. That is all.

Mr. Marcussen: No cross-examination.

(Witness excused.)

* * * * * [59]

Whereupon,

HERMAN HERTZ

recalled as a witness, having been previously duly sworn, was further examined and testified as follows: * * * * * [68]

Redirect Examination

Q. (By Mr. Taylor): Mr. Hertz, I show you Respondent's Exhibits G and H in evidence, being a supplemental agreement dated the 7th day of November, 1951, and notice of exercise of option to purchase real property dated the 27th day of Sep-

(Testimony of Herman Hertz.)

tember, 1951, and call your attention to the fact that these referred to the Tivoli Theatre property.

Actually, at that time, they covered the entire Tivoli property, both the office building and the theatre area? A. That is right.

Mr. Taylor: No further questions.

(Witness excused.)

* * * * * [81]

[Endorsed]: T.C.U.S. Filed April 5, 1954.

RESPONDENT'S EXHIBIT "G"

[Received in Evidence March 16, 1954]

NOTICE OF THE EXERCISE OF OPTION TO
PURCHASE REAL PROPERTY

To Blumenfeld Enterprises, Inc., 70 Eddy Street,
San Francisco, California:

Your attention is directed to that certain agreement and option dated the 23d day of February, 1951, by and between Blumenfeld Enterprises, Inc., a corporation, (therein called the seller) and Harry Morofsky (therein called the buyer), whereby said seller gave to said buyer the exclusive right to buy, on or before October 1, 1951, at 12:00 o'clock noon, standard time, all that certain land and building situated in the City and County of San Francisco, State of California, generally known and designated

as the entire Tivoli Theater Building, number 70 Eddy Street, San Francisco, California, and more particularly described as follows:

Beginning at a point on the northerly line of Eddy Street, distant thereon 68 feet and 9 inches easterly from the easterly line of Mason Street; running thence easterly along said line of Eddy Street 68 feet and 9 inches; thence at a right angle northerly 89 feet and 6 inches; thence at a right angle easterly 75 feet to the westerly line of Glasgow Street; thence at a right angle northerly along said line of Glasgow Street 96 feet; thence at a right angle westerly 75 feet; thence at a right angle southerly 10 feet and 6 inches; thence at a right angle westerly 68 feet and 9 inches; and thence at a right angle southerly 175 feet to the point of beginning.

Being part of 50 Vara Block No. 171. For the purchase price of Three Hundred Thirty-five Thousand Six Hundred Twenty-two and No/100 (\$335,622.00) Dollars.

You Are Hereby Notified that the undersigned Harry Morofsky does elect to exercise said option to purchase said real property on the terms and conditions stated in said agreement and option.

During the escrow period provided for in said agreement and option, you will be notified in whose name the title to said real property will be taken.

You are requested to select an escrow holder pursuant to paragraph 6 of said agreement and option

in order that said transaction may be closed within the time limit specified therein.

Dated: September 27, 1951.

/s/ HARRY MOROFSKY

Receipt acknowledged this 27th day of September, 1951.

Blumenfeld Enterprises, Inc.

/s/ By A. Blumenfeld, Secretary

RESPONDENT'S EXHIBIT "H"
[Admitted in Evidence March 16, 1954]

SUPPLEMENTAL AGREEMENT

This Supplemental Agreement, made and entered into this 7th day of November, 1951, by and between Blumenfeld Enterprises, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of California, herein called "Seller", Harry Morofsky, herein called "Buyer", and Hertz Shoe Clinic, Inc., a corporation, duly organized and existing under and by virtue of the laws of the State of California, herein called "Assignee",

Witnesseth:

Whereas, on February 23, 1951, the Seller and the Buyer made and executed an option agreement, wherein the Seller agreed to sell on the terms expressed in said agreement, certain land and building situated in the City and County of San Fran-

cisco, State of California, more particularly described in said option agreement; and

Whereas, on September 27, 1951, in accordance with said option agreement, the Buyer notified the Seller in writing of his election to purchase the land and building on the terms and conditions stated in said option agreement; and

Whereas, the title to said land and building are to be taken in the name of the Assignee; and

Whereas, the parties hereto mutually desire to change and amend the terms of said option agreement dated February 23, 1951.

Now, Therefore, it is mutually agreed as follows:

1. The Buyer and the Assignee do hereby jointly and severally represent and warrant to the Seller that prior to the execution of this agreement, the Buyer has assigned and transferred to the Assignee all of the right, title and interest of the Buyer, in and to that certain option agreement, dated February 23, 1951, between Blumenfeld Enterprises, Inc., as Seller and Harry Morofsky, as Buyer, together with any right that the Buyer has had, or now has, to purchase from the Seller the land and building described in said option agreement.

2. That the purchase price of said land and building, described in said option agreement, shall be the sum of Three Hundred and Thirty-five Thousand, Six Hundred and Twenty-two (\$335,622.00) Dollars, which sum shall be paid to the Seller as follows:

(a) Within the time specified in said option agreement, the Assignee shall pay the Seller the sum of One Hundred and Eighty-four Thousand, One Hundred and twenty-two (\$184,122.00) Dollars in cash.

(b) The Assignee shall receive credit on account of the purchase price for all deposits made by the Lessees on the leases specified in paragraph 1, subdivision (c) of said option agreement in the amount of Twenty-six Thousand Five Hundred (\$26,500.00) Dollars.

(c) The balance of the purchase price, namely, the sum of One Hundred and Twenty-five Thousand (\$125,000.00) Dollars, shall be evidenced by a promissory note made by the Assignee to the Seller, which said promissory note shall be secured by a second deed of trust on the real property described in said option agreement, and which said deed of trust shall be junior only to a first deed of trust made by the Assignee, as Trustor, to H. R. Ehlers and H. H. Tantau, as Trustees, and Crocker First National Bank of San Francisco, a national banking association, as beneficiary, dated the 26th day of October, 1951, which said first deed of trust is the security for a promissory note made by said Assignee to said Bank in the amount of Three Hundred Thousand (\$300,000.00) Dollars, and which said first deed of trust shall cover two parcels of real property, in addition to the property described in said option agreement.

Said promissory note in the amount of One Hundred Twenty-five Thousand (\$125,000.00) Dollars,

secured by said second deed of trust shall bear interest at the rate of four and one-half (4½%) per cent per annum on the principal amount and on decreasing balances thereof. The principal amount of said promissory note shall be payable by the Assignee to the Seller in monthly installments of One Thousand Two Hundred and Fifty (\$1,250.00) Dollars, or more, plus interest, until the obligation of the Assignee to the Seller is fully paid.

Said promissory note and said second deed of trust shall be on a standard form generally used by title insurance companies in the City and County of San Francisco, State of California, and approved in writing by the Seller.

3. If, after said land and building have been purchased, pursuant to the terms of said option agreement, as amended hereby, the Assignee shall desire to refinance the existing encumbrances against said real property, the Seller agrees to permit the same by removing from record the second deed of trust mentioned in paragraph 2(c) of this Supplemental Agreement and by cancelling the promissory note for which said second deed of trust is the security, and by accepting from the Assignee contemporaneously another promissory note in the amount then due from the Assignee to the Seller, but otherwise on the same terms, and which said new promissory note shall be secured by another second deed of trust which shall be junior only to a first deed of trust hereafter to be executed by the Assignee, subject to the following conditions:

(a) That the deed of trust constituting the first

encumbrance against said real property shall not be in a sum greater than Three Hundred Twenty-five Thousand (\$325,000.00) Dollars, without the written consent of the Seller.

(b) That the moneys realized from such refinancing shall be used by the owner.

(i) first, to finance the erection of a structure on said real property.

(ii) second, to apply any excess sums remaining after the erection of a building on said real property to further reduce the obligation of the Assignee to the Seller under said promissory note secured by said second deed of trust.

(c) Upon refinancing and prior to the commencement of any building development on the real property, the Assignee shall furnish the Seller with plans and specifications showing the proposed improvements to be made, and secure the Seller's written assent thereto, and such improvements shall be commenced by the owner within six (6) months from the date of such refinancing. The Assignee shall submit said plans and specifications to the Seller for approval within ninety (90) days after the completion of such refinancing; the Seller shall have thirty (30) days thereafter to approve or disapprove in writing, said plans and specifications. If the Seller does not approve the same within the time specified, the plans and specifications shall be deemed to have been approved by the Seller. If the same are disapproved by the Seller, within said time, the Assignee shall have sixty (60) days after such disapproval within which to submit revised

plans and specifications and within which to commence the proposed improvements, which said revised plans and specifications shall likewise be subject to the written approval or disapproval by the Seller within thirty (30) days thereafter. After refinancing and disbursements of funds as provided from said refinancing in this paragraph and if construction of the proposed improvements be not commenced within the six (6) months time limit set forth herein, then all funds in the escrow shall be paid to the Seller for application to a pro tanto reduction in the obligation of the Assignee under the aforementioned second deed of trust.

(d) Any moneys realized by refinancing shall be escrowed in writing, either with the financial institution or person lending the money for such refinancing, or with an escrow company to be selected by the Seller, and all disbursements made therefrom shall be used to pay the obligations, or to defray the costs and expenses enumerated in this paragraph, and all disbursements in this escrow shall be subject to the written approval of the Seller.

4. That the lease from the Assignee to the Seller mentioned in paragraph four (4) of said option agreement, and appended thereto as Exhibit "A" thereof shall be amended in the following particulars:

(a) By specifying the manner in which the arbitrators, who shall determine the rental during the extended period, shall be selected.

(b) By giving the Lessor in said lease the right and option to terminate said lease after five (5) years for the purpose of demolishing the building, upon one hundred and eighty (180) days previous written notice.

(c) That attached hereto marked Exhibit "A" and by such reference made a part hereof, are paragraphs 20 and 21 which are to be added to and made a part of that certain indenture of lease which is annexed to the option agreement of February 23, 1951, hereinbefore referred to and marked Exhibit "A" as annexed to said last-mentioned agreement.

5. Except as modified hereby, the parties hereto do confirm, approve and continue in effect, that certain option agreement dated February 23, 1951, between Blumenfeld Enterprises, Inc., as Seller and Harry Morofsky, as Buyer.

In Witness Whereof, the parties hereto have set their hands and seals the day and year first above written.

Blumenfeld Enterprises, Inc.,
a Corporation

/s/ By Joseph Blumenfeld, President

/s/ By A. Blumenfeld, Secretary
Seller

/s/ Harry Morofsky, Buyer

[Seal] Hertz Shoe Clinic, Inc., a Corporation

/s/ By Herman Hertz, President

/s/ By Paul Hertz, Secretary
Assignee

EXHIBIT "A"

20. If the Lessee exercises the option of the Lessee of renewing this lease for an extended term of ten (10) years, as provided for herein, and the parties hereto are unable to agree upon the rental for the demised premises for the extended term, the amount of the rental during the extended term shall be submitted to arbitration in accordance with the provisions of title X of part III of the Code of Civil Procedure of the State of California, and shall be in all respects governed by and construed according to the laws of the State of California; said controversy shall be arbitrated by a person or persons to be chosen by the respective parties for the purpose; provided, that if the parties fail to agree upon the person or persons to be named by them, or if either party hereto shall fail or refuse to submit the controversy to such arbitration, the other party may make application to the Superior Court of the State of California for an order directing such controversy to proceed to arbitration and/or naming the person or persons who shall be arbitrator or arbitrators, if he or they have not been named by the parties hereto. Said application, arbitration and award and the proceedings therefor, and any proceedings for the vacation, modification, correction or confirmation of said award by said court or a judgment thereon, or an appeal therefrom, shall be in accordance with the provisions of the Code of Civil Procedure above specified and of the laws of the State of California, except that each party hereto consents that, if he or she is outside

of the State of California, the service by registered mail upon him or her, as the case may be, of any notice, summons or other writ or process not less than thirty or more than sixty days before the hearings is scheduled to which such notice, summons, writ or process pertains in connection with the arbitration herein agreed to, shall be a valid service upon such party of such notice, summons, writ or process.

21. Anything in this lease to the contrary notwithstanding, it is agreed that the Lessor shall have the right and option to terminate this lease and the term hereof at any time after January 1, 1957, for the purpose of demolishing the building in which the demised premises are located, upon giving one hundred eighty (180) days' previous notice in writing to the Lessee of the Lessor's intention so to terminate the same; and this lease and the term hereof shall cease and terminate at the expiration of one hundred eighty (180) days from the service of said notice on the Lessee, as provided in paragraph fourteen (14) of this lease.

[Endorsed]: No. 14822. United States Court of Appeals for the Ninth Circuit. Blumenfeld Enterprises, Inc., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: July 19, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14822

BLUMENFELD ENTERPRISES, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S STATEMENT OF POINTS

Petitioner states that it intends to rely upon the following points upon the review of the decision of The Tax Court of the United States in the above-entitled cause:

1. The Tax Court erred in holding and deciding that in the determination of the petitioner's net operating loss carry-back from its fiscal year ended

July 31, 1950 and in the determination of its income tax liability for its fiscal year ended July 31, 1948, a deduction was not allowable to the petitioner for the undepreciated cost of a building demolished by its lessee with its permission during the fiscal year ended July 31, 1950.

2. The Tax Court erred in that its opinion and decision are contrary to the law and the regulations and are not supported by substantial evidence of record.

3. The Tax Court erred in ordering and deciding that there was a deficiency in petitioner's income tax liability for its fiscal year ended July 31, 1948 in the amount of \$31,405.31 and in failing to decide that the petitioner had overpaid its income taxes for its said fiscal year by the amount of \$30,803.55.

Dated: August 31, 1955, San Francisco, California.

/s/ SAMUEL TAYLOR,

/s/ WALTER G. SCHWARTZ,

Counsel for Petitioner

[Endorsed]: Filed Aug. 31, 1955. Paul P. O'Brien, Clerk.